TRANSCRIPT OF RECORD.

...E COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 60.

CHAUNCEY DEWEY, CHARLES P. DEWEY, ALBERT DEWEY, ORVILLE C. DEWEY, DAVID M. THORNBURY, ET AL., SURVIVING PARTNERS OF THE FIRM OF DEWEY, VANCE, AND COMPANY, APPELLANTS,

vs.

THE WEST FAIRMONT GAS COAL COMPANY, THE WEST FAIRMONT AND MARION CONSOLIDATED GAS COAL COMPANY AND GILBERT R. VAN ALEN.

FILED OCTOBER 3, 1884.

No. 179.

THE WEST FAIRMONT GAS COAL COMPANY, APPELLANT,

vs.

CHAUNCEY DEWEY, CHARLES P. DEWEY, ALBERT DEWEY ORVILLE C. DEWEY, DAVID M. THORNBURY, ET AL., SURVIVING PARTNERS OF THE FIRM OF DEWEY, VANCE AND COMPANY.

FILED NOVEMBER 8, 1884.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

accession 21853

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 23, 1887.

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1 On the 3d day of October, A. D. 1877, the following bill and Exhibit "A" were filed in the clerk's office of the circuit court of the United States for the district of West Virginia, to wit:

Bill.

In the Circuit Court of the United States for the District of West Virginia. In Chancery.

CHAUNCEY DEWEY *et al.*
vs.
THE WEST FAIRMONT GAS COAL COMPANY *et als.*

To the judges of the circuit court of the United States for the district of West Virginia:

Chauncey Dewey, Charles P. Dewey, Albert Dewey, Orville C. Dewey, David M. Thornburg, James N. Vance, John D. Culbertson, Arthur C. McKee, Nathan Wilkinson, William L. Hearne, Frank J. Hearne, Lewis Jones, Charles Rohr, Joseph Dudley, James Nesbitt, Robert W. McClellan, Jacob Bowman, Frederick Linderman, Henry M. Babcock, Martin Smith, and James Belleville, surviving partners of the firm of Dewey, Vance and Company, who sue in their firm name and of whom the said Chauncey Dewey, Charles P. Dewey, and Albert Dewey are residents of the State of Ohio and the remainder are residents of the State of West Virginia, bring this their bill against the West Fairmont Gas Coal Company, a corporation purporting to be organized and doing business under the laws of the State of New York, having its principal office in the city of New York; the West Fairmont and Marion Consolidated Gas Coal Company, a corporation organized and doing business under the laws of the State of West Virginia and having its principal office at Fairmont, in Marion county, West Virginia; G. R. Van Allen, a resident of the State of New York, and several others whose names and residences are to your orators unknown; and thereupon your orators complain and say that upon and about the 7th day of October, A. D. 1872, your orators' said firm, which was then composed of your

2 orators and Samuel McClellan, since deceased, was engaged in manufacturing pig iron on a large scale at their furnace, near the city of Wheeling, in the State of West Virginia, and in the course of their business were large consumers of coke, and that the West Fairmont Gas Coal Company were then engaged in mining coal and manufacturing coke at Fairmont, in the State of West Virginia; that on or about the said last-mentioned day your orators' said firm and the said West Fairmont Gas Coal Company entered into a contract whereby the said last-mentioned company agreed to manufacture for and deliver to the said firm for use in the said furnace three car-loads of coke per day from that time until the first day of July then next following, for which the said firm agreed to pay the said last-mentioned company at the rate of six cents per bushel of forty-one pounds, to be settled for by notes of the said firm, to be given on the first day of every month for the preceding month's deliveries, payable ninety days after date. Your orators

say that before the making of the said contract the said last-mentioned company had given to the said firm, as a sample, thirty-four car-loads of coke purporting to have been made by the said last-mentioned company, and that this sample, being of excellent coke, formed the basis and inducement of the said contract. Your orators also say that the said coke so to be delivered to the said firm was bargained for by it for the purpose of being used in the said furnace for the manufacture of iron, and that the said last-mentioned company, at and before the making of the said contract, well knew that that and no other was the purpose for which it was contracted for; and your orators say that the said last-mentioned company, in carrying out the said contract, was bound by the true intent thereof to furnish to the said firm coke of good, merchantable quality suitable for use in the said furnace in the manufacture of iron, even if not bound to supply coke which should be fully equal in quality to the said sample. Your orators say that after the making of the said contract the said West Fairmont Gas Coal Company delivered coke to the said firm in various quantities for the space of about thirteen months, until it had delivered two hundred and forty-six car-loads thereof, for all of which it was duly paid at the contract price, leaving, according to the said contract, four hundred and thirty-six car-loads at six hundred and twenty-four bushels to the car-load undelivered. Your orators say that they have at all times been ready to receive and pay for the said four hun-
3 dred and thirty-six car-loads of fair, merchantable coke fit to be used in their said furnace for the manufacture of iron, or coke of the same quality as the said sample, but that the said last-mentioned company did not, although often requested so to do, deliver to the said complainants nor to the said firm the said four hundred and thirty-six car-loads of such merchantable coke fit for the use aforesaid, nor of course of the same quality as the said sample, nor has it delivered any portion thereof; and your orators say that the difference between the price contracted to be paid for the said coke as aforesaid and the greater price which the said firm was compelled to pay for other coke which it was obliged to procure to a like amount was, on the whole four hundred and thirty-six car-loads, the sum of eight thousand six hundred and eighteen dollars and twelve cents, and this last-mentioned price was the ordinary market price for coke during the time when the said last-mentioned company ought, by the terms of the said contract, to have delivered the said four hundred and thirty-six car-loads as aforesaid, and the said last-mentioned company was at all times apprized of the readiness of the said firm to receive and pay for the said coke according to the terms of the said contract; wherefore your orators say that they, as the surviving members of the said firm, are entitled to have from the said West Fairmont Gas Coal Company the said sum of eight thousand six hundred and eighteen dollars and twelve cents.

Further complaining, your orators show unto your honorable court that as the said two hundred and forty-six car-loads of coke were delivered and received as aforesaid they were taken to the said

furnace, and as it was impossible to discover any defect in the said coke by the mere inspection thereof, and it was supposed by the said firm that the said last-mentioned coke was of the same quality as the said sample hereinbefore mentioned, the said two hundred and forty-six car-loads were used by the said firm in their said furnace in the manufacture of iron; and your orators say that the said last-mentioned coke as used by them as aforesaid, so far from being either of good, merchantable quality or of the same quality of the said sample, was of very inferior quality and wholly unfit for use for the purpose for which it was contracted for as aforesaid, so much so that the iron produced by the said furnace, while it was used, was, on account of the poorness of the said coke, of a very inferior quality, and was worth to the said firm much less than it would have been worth had not the iron been vitiated by the bad quality of
4 the coke as aforesaid; and your orators say that the difference between the market value of the iron thus produced by the use of the said inferior coke and the market value at the same time of the iron which would have been produced had the said coke been of good, merchantable quality or of the same quality as the said sample was six thousand seven hundred and eighty-four dollars, to which sum your orators are entitled, as survivors of the said firm, to receive from the said West Fairmont Gas Coal Company. Your orators are informed and believe and charge that the said West Fairmont Gas Coal Company, wilfully intending to defraud your orators' said firm, manufactured the said coke so delivered to and received by the said firm not out of the ordinary fresh slack produced from the coal mines, which is usually and properly used in the manufacture of coke, but partly out of an old slack bank, which had become worthless and worse than worthless from exposure to the weather and partly from a certain stratum, about four inches thick, at the bottom of its coal vein, which stratum is very sulphurous and wholly unfit for use in the manufacture of good coke. Your orators are informed and believe that a like stratum exists in most of the coal veins near Fairmont, and that if mined at all it is usually thrown outside as unfit for use.

Your orators further show that, though the said West Fairmont Gas Coal Company never tendered either to the said firm or to your orators as survivors any part of the said four hundred and thirty-six car-loads of coke, yet it was at the instance of the said firm that the last-mentioned company ceased delivering coke to the said firm, for your orators say that while the said two hundred and forty-six car-loads so received and paid for by your orators' said firm as aforesaid was being delivered the said firm made frequent complaints to the said last-mentioned company that the coke delivered was of poor quality and the said last-mentioned company as frequently promised that the quality would improve, but the quality of the coke did not improve, and your orators' said firm finally, after the said two hundred and forty-six car-loads had been received, refused to receive any more coke of the quality which was being delivered, though being at all times ready and willing to receive the amount contracted for of coke, which should be of the quality

contracted for, of which readiness and willingness the said last-mentioned company at all times had knowledge; but now the said West Fairmont Gas Coal Company pretends that it has complied with its said contract in part and was
5 ready to comply with it entirely, and that the said firm was in default, and that your orators as such survivors should be made to answer in damages, and the said last-mentioned company brought an action of assumpsit on the 17th day of January, A. D. 1877, in the circuit court for Ohio county, in the State of West Virginia, against your orators as the surviving members of the said firm, in which suit it set up the said contract, and the said pretended breach of same by said firm in declining to receive the said four hundred and thirty-six car-loads of coke, and claimed damages therefor to the amount of — thousand dollars; and afterwards, on the 7th day of June, A. D. 1877, at the next succeeding term of the said last-mentioned court, the said action was, on motion of the plaintiff, and on the grounds of the residence of the plaintiff in the State of New York, removed to your honorable court, on the common law side thereof. Your orators deny in toto the right of the plaintiff in the said action to recover anything from your orators at law or in equity, and deny the existence of any indebtedness at all as being due from your orators to the plaintiff in that action; and your orators say that before the said cause was removed as aforesaid your orators tendered and offered to file in the said action two special pleas, in one of which was set up by way of offset your orators' claim against the said West Fairmont Gas Coal Company by reason of its failure to deliver the said four hundred and thirty-six car-loads of merchantable coke, and in the other your orators said claim against the said company by reason of the injury caused by the bad quality of the coke so used in the said furnace as aforesaid, and the said circuit court of Ohio county rejected your orators' said pleas, basing its rejection of them, not on any technical or formal grounds, but on the grounds that your orators' said claims were not of such nature that they could be pleaded as offsets at law. Your orators then pleaded non-assumpsit, and the case was removed as aforesaid. Your orators excepted to the action of the said court in rejecting their said pleas, but they are not advised as to whether such action was correct or not. They say, however, that whatever may be their legal rights in the premises, yet their said claims constitute a clear ground for the jurisdiction of your honorable court, in order that even should the said West Fairmont Gas Coal Company succeed in establishing its said pretended claim your honorable court may give effect to the right of your orators as aforesaid. Your orators — informed and believe and charge that the said West Fairmont Gas Coal
6 Company is wholly insolvent, unless it may be the opinion of your honorable court that it is the owner of stock in the West Fairmont and Marion Consolidated Gas Coal Company under the facts hereinafter set forth, or the owner of the property conveyed as hereinafter alleged, and, in that event, it is insolvent, except as to the property which has thus been fraudulently put out of its possession; and your orators further say that their said claim against

the said West Fairmont Gas Coal Company greatly exceed in amount the said pretended claim made by it in the said action at law, even were it a valid claim; but your orators say that by reason of the said insolvency any judgment or decree for money which your orators might obtain against the said West Fairmont Gas Coal Company by reason of their said two claims would be entirely worthless, and therefore they say that great injustice might be done your orators if the said West Fairmont Gas Coal Company were allowed to prosecute its said action under the circumstances. Your orators are informed and believe and charge that before and up to the time of the making of the conveyance next hereinafter mentioned the said West Fairmont Gas Coal Company was the owner of a considerable quantity of real and personal property situated in the county of Marion aforesaid; that on the first day of June, A. D. 1875, the said claims of your orators having already accrued and being unpaid, the said West Fairmont Gas Coal Company, intending to delay, hinder, and defraud your orators and other creditors, as your orators are informed and believe and charge, executed and delivered a deed whereby it sought and attempted to convey all the real and personal property then belonging to it, so far as your orators have been able to discover, to the said West Fairmont and Marion Consolidated Gas Coal Company. Your orators say that by the terms of the said deed the only consideration of the said conveyance was expressed to be ten thousand two hundred shares, full paid, of the capital stock of the said West Fairmont and Marion Consolidated Gas Coal Company; but your orators are informed and believe and charge that the said West Fairmont Gas Coal Company, further designing to delay, hinder, and defraud your orators and other creditors, caused the said ten thousand two hundred shares of stock so expressed to be the consideration of the said deed to be issued, not to itself, but to its own stockholders, in the proportion in which they had held stock in itself, and that the said West Fairmont and Marion Consolidated Gas Coal Company is composed, as your orators are informed and believe,

7 of what formerly were two companies, the said West Fairmont Gas Coal Company being one of them, and the stockholders of the consolidated are the same persons who were formerly stockholders in these two companies; that the number of shares of stock in the consolidated company is equal, as your orators are informed and believe, to *be* four times the aggregate number of the shares in the two old companies, the par value of the stock being twenty-five dollars in the new company and one hundred in the old; that the other old company made a conveyance of its property to the West Fairmont and Marion Consolidated Gas Coal Company similar to that made as aforesaid by the West Fairmont Gas Coal Company, and without other consideration the said consolidated company issued all of its stock to the stockholders of the two old companies, giving each one a number of shares proportionate to the number he held in the particular old company of which he was a member.

Wherefore your orators say that the said conveyance so made as aforesaid by the West Fairmont Gas Coal Company was and is

without consideration, fraudulent and void as to your orators; that its effect, if it were permitted to stand, would be to allow the said West Fairmont Gas Coal Company to apply its property to the payment of its stockholders in preference to its creditors, and that since the making of the said conveyance the said West Fairmont Gas Coal Company has wholly ceased from doing business and has owned no property; that the said G. R. Van Allen and the said other persons, whose names are unknown to your orators, were stockholders in the said West Fairmont Gas Coal Company and received stock in the manner set forth from the said company, and that these persons and the said West Fairmont and Marion Consolidated Gas Coal Company were and are, by means of the said conveyance and in the manner hereinbefore set forth, conspiring with the said West Fairmont Gas Coal Company to defraud your orators and other creditors of the said last-mentioned company.

Your orators file with their bill as Exhibit "A" a copy of the said deed so made as aforesaid by the said West Fairmont Gas Coal Company and ask that it be taken as a part of this bill, and they refer to the same for a particular description of the property conveyed and of the terms of the deed. In tender consideration whereof and for as much as your orators are remediless in the premises save by the aid of a court of equity, where matters of the kind are
8 alone and properly cognizable, may it please your honorable court to grant unto your orators the most gracious writ of subpœna of this honorable court to the said West Fairmont Gas Coal Company, West Fairmont and Marion Consolidated Gas Coal Company, and the said G. R. Van Allen to be directed that they may be made parties defendant to this bill, and that your orators may have leave to make parties to this suit and that proper process may issue against the said other persons, stockholders in the said West Fairmont Gas Coal Company, whose names and residences are unknown to your orators, when such names and residences shall be discovered; that the writ of injunction of this honorable court may issue against the said West Fairmont Gas Coal Company and that it may be perpetually enjoined from further prosecuting its said action at law against your orators, now depending on the common law side of this honorable court; that your orators' two said claims against the said West Fairmont Gas Coal Company may be established and the amount thereof decreed to your orators that the said conveyance, of which Exhibit "A" of this bill is a copy, may be declared null and void and may be set aside so far as your orators' said claims are concerned, and that your orators may have such other and general relief in the premises as to equity may seem just and the nature of their case may require, and your orators will ever pray, &c.

D. LAMB,
W. H. HEARNE,
H. RUSSELL,
Solicitors for Complainants.

UNITED STATES, }
District of West Virginia, } *ss:*

J. N. Vance, being duly sworn, says that he is one of the complainants in the foregoing bill; that the facts and allegations therein contained, so far as they are stated on his own knowledge, are true, and that so far as they are stated on information he believes them to be true.

J. N. VANCE.

Taken, sworn to, and subscribed before me this 29th day of September, A. D. 1877.

HANNIBAL FORBES,
U. S. Commissioner.

9 ADDENDUM—EXHIBIT "A" OF BILL.

Deed.

THE WEST FAIRMONT GAS COAL COMPANY
vs.
THE WEST FAIRMONT AND MARION CONSOLIDATED GAS COAL COMPANY.

This deed, made this first day of June, in the year of our Lord one thousand eight hundred and seventy-five, between the West Fairmont Gas Coal Company, a corporation organized under the laws of the State of New York, of the first part, and "The West Fairmont and Marion Consolidated Gas Coal Company," a corporation organized and existing under and by virtue of the laws of the State of West Virginia, of the second part, witnesseth: That the said party of the first part, for and in consideration of ten thousand two hundred shares, full paid, of the capital stock of the said "The West Fairmont and Marion Consolidated Gas Coal Company," party of the second part, of the par value of twenty-five dollars per share and of the aggregate par value of two hundred and fifty-five thousand dollars, now delivered by the said party of the second part to the said party of the first part, hath bargained and sold and by these presents doth grant and convey to the said party of the second part, its successors and assigns, all the right, title, and interest of the said party of the first part in and to the lands, leases, mines and mining privileges, easements, and appurtenances of and belonging to the said party of the first part, situate, lying, and being on Buffalo creek, in the county of Marion, State of West Virginia, together with all the buildings, machinery, fixtures, and things appurtenant thereto and all tools, implements, and other chattels appertaining to or used in the business of the said party of the first part and before the ensealing and delivery of these presents belonging to the said party of the first part, and the possession whereof is now delivered to the said party of the second part; but the said real estate, mines, mining privileges, leases, easements, and appurtenances herein granted and conveyed, and this grant and conveyance thereof, are subject, nevertheless, to all the exceptions, reservations, limitations, and con-

ditions made, reserved, or limited by virtue of any and all the deeds of conveyance whereby said real estate or any part thereof or any such leases, mining privileges, easements, or appurtenances were conveyed to the said party of the first part.

The real estate, mines, mining privileges, easements, and appurtenances herein and hereby granted embrace the following, to wit:

First. All the lands, mines, privileges, easements, and appurtenances granted to the said party of the first part by Henry Yarwood Athiel, James T. Saultee, George Savory, James R. Floyd, Clarence S. Braum, and Gilbert R. Van Alen, by their deed of conveyance, dated the first day of December, one thousand eight hundred and seventy, of record in the office of the clerk of the county court of said county of Marion, in deed book number twenty-one, at pages twelve and twenty-six, inclusive, excepting fourteen and three-eighths acres heretofore conveyed by said party of the first part to Elums Hamilton by deed dated on the eleventh day of December, 1874, recorded in the said clerk's office, in book number 25 of deeds, at page —, but the coal underlying said 14⅜ acres and the certain mining privileges or easements which were and are excepted from and out of the operation of said last-named deed are, as aforesaid, included in this grant and conveyed to the said party of the second part as fully as the same were excepted and reserved as aforesaid in and by said conveyance to said Hamilton.

Second. All the lands, with the appurtenances and privileges thereunto in any wise belonging, except as hereinbefore and hereinafter mentioned, which were conveyed to the said party of the first part by William N. Bebout and wife by deed dated the 18th day of October, in the year of our Lord 1872, of record in the aforesaid clerk's office, in book No. 22 of deeds, at page 345, excepting and reserving from the operation of this deed so much of the real estate last aforesaid as was conveyed by the said party of the first part to Thomas Hough by deed dated the 24th day of December, 1873, of record in the said clerk's office, in book No. 23 of deeds, at page 314, and excepting and reserving also so much of the same real estate as was conveyed by said party of the first part to said Thomas Hough by its certain other deed dated the first day of May, 1874, also of record in said clerk's office, in book No. 24 of deeds, at page 136.

Third. All the real estate (consisting of the coal underlying one hundred and ten square poles of land) conveyed to the said party of the first part by William Gaskill and wife by deed dated the 27th day of August, 1874, of record in the clerk's office of said county court, in book No. 25 of deeds, at page —; and besides the exceptions and reservations herein otherwise described there is also excepted and reserved from and out of the operation of this deed so much of the real estate heretofore owned by the said party of the first part as was conveyed by said party to said William Gaskill by deed the 27th day of August, in the year one thousand eight hundred and seventy-four. For a full and particular description of the real estate, mines, mining privileges, easements, and appurtenances herein and hereby described, granted, and conveyed, and of the ex-

ceptions, reservations, limitations, and conditions to which
11 & 12 grant this is subject, the parties hereto do hereby make special reference to the several deeds of conveyance hereinbefore mentioned and referred to.

And the parties to these presents do hereby mutually covenant and agree that this deed and the words of grant, exception, reservation and limitation, herein contained shall always be taken, held, and construed to convey to and vest in the said party of the second part of all the estate, right, title, and interest of the said party of the first part in and to or in respect of the aforegranted real estate, mines, mining privileges, casements, appurtenances, property, and chattels as fully and beneficially as, and not otherwise, that the same are, at and before the ensealing and delivery of these presents, held, owned, and possessed by the said party of the first part.

In witness whereof and in pursuance of a resolution of the board of directors of the said West Fairmont Gas Coal Company, concurred in by the stockholders of said company, adopted and entered upon the records of said company on the 24th day of April, 1875, at the office of said company in the city of New York, the said West Fairmont Gas Coal Company, party of the first part, has caused the names of its president and secretary to be hereunto subscribed and its corporate seal to be hereto affixed on the day and year first above written.

[CORPORATE SEAL.] GILBERT R. VAN ALEN, *President.*
CLARENCE S. BROWN, *Secretary.*

STATE OF NEW YORK, *City and County of New York,* } *To wit:*

I, Charles Nettleton, a commissioner for the State of West Virginia, residing in the city and county aforesaid, do hereby certify that on the 23d day of June, 1875, personally came before me Gilbert R. Van Alen, president of the West Fairmont Gas Coal Company, and Clarence S. Brown, secretary of the same company, both being personally known to me, and being by me severally sworn, do say severally that he, the said Gilbert R. Van Alen, is president of said The West Fairmont Gas Coal Company, and the said Clarence S. Brown, that he is secretary of said company, and that they both know the corporate seal of said company, and that the seal affixed to the annexed deed dated the 1st day of June, 1875, is the corporate seal of said company, and that it was affixed to said deed by order of the board of directors of said company, and they have signed their respective names to said deed by like order as president and secretary of said company, and they severally acknowledge said deed to be their act and deed and the act and deed of said The West Fairmont Gas Coal Company.

Given under my hand and official seal, in my said city of New York, this 23d day of June, 1875.

[OFFICIAL SEAL.] CHARLES NETTLETON,
Commissioner for West Virginia in New York.

WEST VIRGINIA, *To wit:*

Be it remembered that on the 29th day of September, 1875, the foregoing instrument of writing, bearing date on the 1st day of June, 1875, was presented to me, John B. Crane, clerk of the county court of Marion county, in my office, and, together with the certificate thereto annexed, was admitted to record.

Teste: JOHN B. CRANE, *Clerk.*

A copy teste: JOHN B. CRANE,
Clerk County Court Marion County, West Virginia.

13 And on the same day, to wit, on the 3rd day of October, 1877, subpœna in chancery was issued out of the clerk's office of said circuit, which is in words and figures following, to wit:

UNITED STATES OF AMERICA, }
District of West Virginia, } *ss:*

The President of the United States of America to the marshal of the district of West Virginia, Greeting:

You are commanded to summon West Fairmount Gas Coal Company, a corporation purporting to be organized and doing business under the laws of the State of New York and having its principal office in the city of New York; The West Fairmount and Marion Consolidated Gas Coal Company, a corporation organized and doing business under the laws of the State of West Virginia and having its principal office at Fairmount, in Marion county, West Virginia; G. R. Van Allen, a resident of the State of New York, and several others whose names and residences are unknown, if they be found in your district, to be and appear in the circuit court of the United States for the district of West Virginia aforesaid, at rules to be held in the clerk's office of said court at Parkersburg on the
14 first Monday of November next, to answer a certain bill in chancery upon injunction filed and exhibited in said court against them by Chauncey Dewey, Charles P. Dewey, Albert Dewey, Orville C. Dewey, David M. Thornburg, James N. Vance, John D. Culbertson, Arthur C. McKee, Nathan Wilkinson, William L. Hearne, Frank J. Hearne, Lewis Jones, Charles Rohr, Joseph Dudley, James Nesbitt, Robert W. McClellan, Jacob Bowman, Fredric Linderman, Henry M. Babcock, Martin Smith, and James Bellville, survivi-g partners of the firm of Dewey, Vance and Company, who sue in their firm name, and of whom the said Chauncy Dewey, Charles P. Dewey, and Albert Dewey are residents of the State of Ohio, and the remainder are residents in the State of West Virginia; hereof they are not to fail under the penalty of the law thence ensueing; and have then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 3rd day of October, A. D. 1877, and in the 102 year of the Independence of the United States of America.

[Seal of the C. C. U. S., Dist. W. Va.]

Attest: W. H. HATCHER, *Clerk.*

15 MEMORANDUM. The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first day of November, 1877, otherwise the said bill may be taken *pro confesso*.

W. H. HATCHER, *Clerk.*

And on another day, to wit, on the 8th day of October, 1877, the foregoing subpœna in chancery was returned and filed in the clerk's office of said court with the following endorsement thereon, to wit:

UNITED STATES, *District of West Virginia*, } *ss:*

Served the within process as to the West Fairmount Gas Coal Company, the same being a non-resident of the State of West Virginia, by delivering a copy of the same to James Morrow, solicitor for said company, at the city of Wheeling, West Virginia, on the 4th day of October, 1877, and at the same time and place I served the within process as to the West Fairmount and Marion Consolidated Gas Coal Company by delivering a copy of the same to James Morrow, he being the duly constituted attorney of the said last-mentioned company for the service of process.

J. D. MAXWELL,
Deputy U. S. Marshal.

To Geo. W. Ratten, U. S. marshal, dist. W. Va.

16 And on another day, to wit, on the 19th day of October, 1877, the following notice with the return thereon was filed in the office of the clerk of said court, to wit:

Notice.

In the Circuit Court of the United States, District of West Virginia.
In Chancery.

CHAUNCEY DEWEY *et al.*
vs.
THE WEST FAIRMOUNT GAS COAL COMPANY *et al.*

The West Fairmount Gas Coal Company, one of the defendants in the above-entitled suit, will take notice that the complainants, suing as surviving partners of the firm of Dewey, Vance & Company, will, on the 17th day of October, A. D. 1877, before the honorable John J. Jackson, one of the judges of the said court, at his chambers, at Parkersburg, move the said judge to grant an injunction against the said West Fairmount Gas Coal Company to enjoin it from further prosecuting an action at law now depending in the said court in which the said West Fairmount Gas Coal Company is plaintiff and the said complainants are defendants.

D. LAMB,
W. H. HEARNE AND
H. RUSSELL,
Solicitors for Complainants.

To the West Fairmount Gas Coal Company.

17 Endorsed.

UNITED STATES,
State of West Virginia, } *To wit:*

Henry M. Russell, being first duly sworn, says that on the 2d day of October, A. D. 1877, he served the within notice by delivering a copy thereof to William P. Hubbard, one of the solicitors of the within-named defendant, The West Fairmount Gas Coal Company, in the city of Wheeling, county of Ohio, and State of West Virginia.

Taken, sworn to, and subscribed before me this 17th day of October, A. D. 1877.

JASPER Y. MOORE,
Clerk D. C. U. S. D. C., W., W. Va.

And on the same day, to wit, on the 19th day of October, A. D. 1877, the following order was made and entered of record, to wit:

Order of Injunction.

In the Circuit Court of the United States for the District of West Virginia. In Chancery.

CHAUNCY DEWEY *et al.*, Surv'ng Partners of the Firm of Dewey, Vance and Company,

vs.

THE WEST FAIRMOUNT GAS COAL COMPANY *et als.*

Vacation order.

18 Notice having been duly served upon the West Fairmount Gas Coal Company, one of the defendants in this suit, that on the 17th day of October, A. D. 1877, the complainants would move for the injunction hereinafter mentioned and allowed, upon consideration of said notice and return and of the bill heretofore filed, it is ordered that the said West Fairmount Gas Coal Company be enjoined, until the further order of this court, from further prosecuting a certain suit now depending on the common law side of this court, wherein the said West Fairmount Gas Coal Company is plaintiff and the complainants in this suit are defendants, and that the said West Fairmount Gas Coal Company be served with a copy of this order; but this order shall not take effect until the complainants or some one for them shall file with the clerk of this court a bond in the sum of $1,000.00, with security sworn to be sufficient, conditioned to pay all costs and damages consequent upon the awarding of the said injunction.

And on another day, to wit, on the 24th day of November, A. D. 1877, at a circuit court of the United States for the district of West Virginia, the following order was entered of record, to wit:

19 DEWEY, VANCE AND CO.
vs.
THE WEST FAIRMOUNT GAS COAL COMPANY *et als.* } In Chancery.

This day came the defendants, by their counsel, James Morrow, Esquire, and tendered three special pleas.

Plea to the Jurisdiction — G. R. Van Alen. Tendered in Open Court 24th Nov'r, 1877.

In the Circuit Court of the States for the District of West Virginia. November Term, 1877. In Chancery.

CHAUNCEY DEWEY *et als.*, Surv'ng Partners of the Firm of Dewey, Vance and Company,

vs.

THE WEST FAIRMOUNT GAS COAL COMPANY and Others.

And now in his proper person comes Gilbert R. Van Alen, one of the defendants named in the complainants' said bill of complaint, and for plea to the jurisdiction of this court says—

That of the complainants named in the said bill of complaint the said Chauncy Dewey, Charles P. Dewey, and Albert Dewey are residents of the State of Ohio and all the other complain-
20 ants are residents of the State of West Virginia; that the defendant, The West Fairmount Gas Coal Company, is a corporation aggregate, organized under and deriving its corporate name and existence from the laws of the State of New York, having its principal office in the said State of New York, and that all of its stockholders are residents of the same State of New York, except one, to wit, Charles M. Davison, who is a resident of the State of West Virginia; that the defendant, The West Fairmount and Marion Consolidated Gas Coal Company, is a corporation aggregate, organized under and deriving its corporate powers from the laws of the State of West Virginia, and that all the stockholders of said last-named corporation are citizens and residents of the State of New York, except Charles C. Davison, who is a resident of the State of West Virginia; —— Dietrich, who is a resident of the State of Maryland, and —— Saulsbury, who is a citizen of Great Britain, resident in England.

And the said defendant further avers that he is, and was at the time of the commencement of this suit, a resident of the State of New York, and was not an inhabitant of nor to be found within the State of West Virginia at the time the said suit was commenced.

21 Gilbert R. Van Alen, being duly sworn, on his oath says that the foregoing plea is true in fact, and that it is not interposed for delay.

GILBERT R. VAN ALEN.

The undersigned, an attorney and solicitor, practicing in the circuit court of the United States for the district of West Virginia, hereby certifies that, in his opinion, the foregoing plea of Gilbert R. Van Alen is well founded in law.

JAMES MORROW, JR.

WM. P. HUBBARD,
JAMES MORROW, JR.,
Counsel.

Subscribed and sworn to in open court 23rd Nov'r, 1877.
W. H. HATCHER, *Clerk.*

Plea to the Jurisdiction by West Fairmount and Marion Consolidated Gas Coal Company. Tendered in Open Court 24th Nov'r, 1877.

In the Circuit Court of the United States for the District of West Virginia. November Term, 1877. In Chancery.

CHAUNCEY DEWEY and Others, Surviving Partners of the Firm of Dewey, Vance and Company,

vs.

THE WEST FAIRMOUNT GAS COAL COMPANY and Others.

Now comes the defendant, The West Fairmount and Marion
22 Consolidated Gas Coal Company, by James Morrow, Jr., its attorney, and for plea to the jurisdiction of this court says—

That the said defendant is a corporation aggregate, deriving its corporate name, existence, and authority from the State of West Virginia; that its stockholders are all citizens of the State of New York, except —— Saulsbury, who is a resident of England; —— Deitrich, who is a resident of the State of Maryland, and Caroline C. Davison, who is a resident of the State of West Virginia.

That its codefendant, The West Fairmount Gas Coal Company, is a corporation of the State of New York, deriving its corporate existence and power from the laws of that State; that all the stockholders of said last-named corporation are residents of the said State of New York, except Charles M. Davison, who is a resident of the State of West Virginia.

That its codefendant, Gilbert R. Van Alen, is a resident of the State of New York, and was not an inhabitant of the State of West Virginia nor found therein at the time this suit was commenced.

And this the said defendant is ready to verify.

Whereupon it prays if this court will or ought to have further cognizance of the said bill of complaint or w-ether the de-
23 fendant can or will be required to make any further or other answer thereto.

THE WEST FAIRMOUNT AND MARION CONSOLIDATED GAS COAL COMPANY,
By JAMES MORROW, JR.,
Its Attorney & Solicitor.

WM. P. HUBBARD,
JAMES MORROW, JR.,
Counsel.

Gilbert R. Van Alen, being duly sworn, on his oath says that the foregoing plea is true in fact and that it is not interposed for delay.

GILBERT R. VAN ALEN.

The undersigned attorney hereby certifies that, in his opinion, the foregoing plea is well founded in law.

JAMES MORROW, JR.

Subscribed and sworn to in open court this 23rd November, 1877.

WM. H. HATCHER, *Clerk.*

Plea to the Jurisdiction by West Fairmount Gas Coal Company. Tendered in Open Court 24 November, 1877.

24 In the Circuit Court of the United States for the District of West Virginia. November Term, 1877. In Chancery.

CHAUNCY DEWEY and Others, Surviving Partners of the Firm of Dewey, Vance & Company.

vs.

THE WEST FAIRMOUNT GAS COAL COMPANY and Others.

And now comes the said The West Fairmount Gas Coal Company, by James Morrow, Jr., its attorney, and, for plea to the jurisdiction of this honorable court, says that the said defendant is a corporation aggregate, organized under and deriving its name and existence and its corporate powers from the State of New York, of which State also all of its stockholders are residents, except Charles M. Davison, who is a resident of the State of West Virginia, and that the said corporation has not now, and did not have at the time of the commencement of this suit or at any time since, any place of business, office, officer, or agent within the said State of West Virginia; that its codefendant, The West Fairmount and Marion Consolidated Gas Coal Company, is a corporation aggregate, organized under and existing by virtue of the laws of the State
25 of West Virginia, and that all of its stockholders, to wit, Gilbert B. Van Alen, Mary A. Van Alen, Henry J. Davison, James Brown, John Crosby Brown, and others, are residents of the State of New York; Caroline C. Davison, who is a resident of the State of West Virginia; —— Detrich, who is a resident of the State of Maryland, and —— Saulsbery, who is a citizen and resident of England; that its codefendant, Gilbert R. Van Alen, is a resident of the State of New York and was at the time of the commencement of this suit, and that the complainants are all residents of the State of West Virginia, except the said Chauncy Dewey, Charles P. Dewey, and Albert Dewey, who are residents of the State of Ohio; and this the said defendant is ready to verify. Whereupon it prays the judgement of this honorable court if it will or ought to have further cognizance of the bill of complaint aforesaid and whether this

defendant can or will be required to make any other or further answer to said bill of complaint.

THE WEST FAIRMOUNT GAS COAL CO.,
By JAMES MORROW, JR., *Attorney and Solicitor.*

W. P. HUBBARD,
JAMES MORROW, JR.,
Counsel.

26 Gilbert R. Van Alen, being duly sworn, on his oath says that he is president of the West Fairmount Gas Coal Company and that its foregoing plea is true in fact and that it is not interposed for delay.

GILBERT R. VAN ALEN.

I, James Morrow, Jr., an attorney and solicitor of the circuit court of the United States for the district of West Virginia, do hereby certify that, in my opinion, the foregoing plea of the West Fairmount Gas Coal Company is well founded in point of law.

JAMES MORROW, JR.

Subscribed and sworn to in open court 23rd Nov'r, 1877.
W. H. HATCHER, *Clerk.*

And on another day, to wit, on the 26th day of November, A. D. 1877, at a circuit court of the United States for the district of West Virginia, continued and held on that day at Parkersburg, in said district, the following order was passed and entered of record, to wit:

27 DEWEY, VANCE AND COMPANY
vs.
THE WEST FAIRMOUNT GAS COAL COMPANY and Others. } In Chancery.

It appearing to this court that the order entered in this cause at a former day of this term was entered by mistake, and that it does not correctly state the proceedings had before the court on that day, the said order is hereby set aside; and now come the defendants, The West Fairmount Gas Coal Company and The West Fairmount and Marion Consolidated Gas Coal Company, by James Morrow, Jr., attorney, for the sole purpose of excepting and pleading to the jurisdiction of this court, and the said defendants tendered each its several plea to the jurisdiction of this court; and come also Gilbert R. Van Alen in his proper person, and, not appearing here except to object and plead to the jurisdiction of this court, tenders his plea to the jurisdiction; and the complainants being present by their counsel, Messrs Russell & Hearne, it is, on consideration, ordered that said pleas be filed, and on motion of complainants said pleas are set down for argument; and the court, having heard the argument upon the question of jurisdiction arrising on said pleas,
28 doth take time to consider of its judgement to be rendered thereon.

And on the same day the following order was entered, to wit:

DEWEY, VANCE AND COMPANY
vs.
THE WEST FAIRMOUNT GAS COAL COMPANY and Others. } In Chancery.

On motion of the complainants, by their attorneys, it is ordered that the injunction heretofore awarded in this cause in vacation be continued in force until the same shall be dissolved by the further order of the court, but without prejudice to the defendants as to the pleas now filed to the jurisdiction of the court; upon the consideration whereof time is taken.

And on another day, to wit, on the 19th day of September, A. D. 1878, the following order was made, to wit:

DEWEY, VANCE AND COMPANY
vs.
THE WEST FAIRMOUNT GAS COAL COMPANY and Others. } In Chancery.

29 The court, having maturely considered the pleas to the jurisdiction heretofore filed in this cause and the arguments of counsel thereon, is of the opinion to over-rule the said pleas to the jurisdiction of this court, and it is accordingly ordered that said pleas to the jurisdiction of this court be, and the same, are overruled.

And thereupon came the defendants, by their counsel, and filed their demurrer to the complainants' said bill of complaint and the complainants join in said demurrer, and on defendants, motion, this cause is set down for argument on the said demurrer.

The demurrer referred to in the foregoing order is in words and figures following, to wit:

In the Circuit Court of the United States for the District of West Virginia. In Chancery.

DEWEY, VANCE AND COMPANY

vs.

THE WEST FAIRMOUNT GAS COAL COMPANY and Others.

And now comes the West Fairmount Gas Coal Company by leave of the court for that purpose first had and obtained, and, by protestation not admitting that any matter or thing by the said
30 complainants alleged and set forth in *in* their said bill of complaint is true, demurs to the said bill of complaint and says that the matters and allegations therein contained as the same are therein pleaded and set forth are not sufficient in law to entitle the said complainants to the relief by them in their said bill of complaint prayed, or to any relief. Therefore this defendant demands the judgment of this honorable court if he can or will be required

to make any further answer to said bill of complaint, and they pray to be hence dismissed with their reasonable costs, &c.

THE WEST FAIRMOUNT GAS COAL CO.,
By JAMES MORROW, JR., *Attorney.*

WM. P. HUBBARD,
JAMES MORROW, JR., *Counsel.*

Gilbert R. Van Alen, being duly sworn, says that he is president of the West Fairmount Gas Coal Company, and that the demurrer above is not interposed for delay.

GILBERT R. VAN ALEN.

James Morrow, Jr., an attorney practicing in said court, hereby certifies that in his opinion the demurrer of the defendant above named is well founded in law.

JAMES MORROW, JR.

31 And on another day, to wit, on the 26th day of September, 1878, the following order was made and entered, to wit:

DEWEY, VANCE AND COMPANY
vs.
THE WEST FAIRMONT GAS COAL COMPANY *et als.* } In Chancery.

This day came the parties, by their counsel, and, by consent, the argument of the demurrer heretofore filed in this cause is set down for Wednesday, the eleventh day of December, 1878.

And on another day, to wit, on the 14th day of December, 1878, the following order was made and entered of record, to wit:

DEWEY, VANCE AND COMPANY
vs.
THE WEST FAIRMOUNT GAS COAL COMPANY and Others. } In Chancery.

This day came the parties, by their counsel; and the questions of law arising on the demurrer of the defendant, set down for hearing on a former day of this court, having been maturely considered, the court is of opinion to overrule said demurrer; and there-
32 upon the defendants, by leave of the court, file their answer to the bill, to which the plaintiff replies generally.

Answer of West Fairmont Gas Coal Company.

In the Circuit Court of the U. S. for the District of W. Va.

DEWEY, VANCE & CO.

vs.

THE WEST FAIRMONT GAS COAL COMP'Y.

The separate answer of the West Fairmont Gas Coal Company to the bill of complaint of Orville C. Dewey and others, surviving members of the firm of Dewey, Vance & Co., complainants, against this defendant and others.

This defendant, now and — all times hereafter saving and reserving unto itself all benefit and advantage of exception which can or may be taken to the many errors, uncertainties, and other imperfections in the said complainants' said bill of complaint contained, for answer thereto or unto so much and such parts thereof as this defendant is advised is or are necessary for this defendant to make answer unto, answering, says:

This defendant admits that complainants were manufacturers of pig iron at the time in the bill alleged, and that they were large consumers of coke in their said business, and that they, in their firm name and capacity, contracted with this defendant for the purchase of coke from the defendant in the quantities and upon the terms in the said bill of complaint stated, except that it is not true that this defendant, either by that said contract or otherwise, contracted or agreed to manufacture or deliver to said firm three car-loads of coke per day, as in the said bill of complaint stated, during the period of time therein stated or during any period of time; but this defendant did contract with said complainant to deliver to said firm an average of three car-loads of coke per day during the period of time in the bill stated, and defendant states that the whole aggregate quantity of coke contemplated by said contract, and which, under a full and complete execution thereof, would have been delivered to the said firm by this defendant, is 681 car-loads, equal to 424,944 bushels, the aggregate proceeds of which, at the contract price of six cents per bushel of forty-one pounds, would have been $25,496.64, all of which would have been delivered by this defendant to the said firm within the time limited by said contract but for the wrong and default of the said firm as hereafter set forth.

This defendant, further answering, denies that said coke was sold by sample, as in the said bill alleged, and denies that the coke so contracted and to be delivered to the said firm of Dewey,
33 Vance & Co. was to be of any ascertained or prescribed quality; and defendant also expressly denies that the coke furnished to said complainant (the said firm of Dewey, Vance & Co.) by this defendant before the making of said contract was coke of excellent quality, as in the said bill of complaint alleged. On the contrary, defendant avers that the coke manufactured by this defendant shortly prior to the making of the said con-

tract was, as defendant is advised and believes, the first coke ever manufactured from coal mined at or near Fairmont, in Marion county, W. Va.; that said manufacture was an experiment made by defendant by which to test and determine the quality and value of the coke which might be produced from the said coal, and thereby to develop a new manufacture in West Virginia, and at the same time to utilize more fully the large coal property owned by the defendants at Fairmont aforesaid. Defendant, in fact, says that no coke had then yet been manufactured from coal taken from the extensive field or deposit of bituminous coal lying along the Monongahela and West Fork rivers, in the said State of West Virginia.

That having manufactured a quantity of coke from said coal, taken from the defendant's mines at Fairmont aforesaid, defendant caused some of the same to be delivered to the complainants to be by them tried, experimented with, and tested in their furnace in the manufacture of pig iron, and also caused some of the same coke to be delivered to George Hardman, a manufacturer of pig iron in Preston county, W. Va., for a like purpose. That complainants well knew that said coke was delivered to them for the purpose mainly of being tried and tested by them, and they in fact received it and used it with a view chiefly of making a trial and test of its utility and value in the manufacture of pig iron and its fitness for use in that manufacture; that complainant, having used, tried, and tested said coke to their satisfaction in the manufacture of pig iron, pronounced — to be not coke of excellent quality, as in their said bill of complaint they allege to have been, but coke of inferior quality, and so stated to the officers and agents of this defendant.

Defendant, further answering, finds it necessary to aver and show that the best coke manufactured in the coal field of West Virginia and Pennsylvania, with regard to fitness for use in the manufacture of pig iron, is that which is manufactured at Connellsville, in the State of Pennsylvania, and which is known to the trade as "Connellsville coke;" that complainants were using "Connellsville coke" mainly or exclusively at and before the time of the trial and
34 test of defendant's coke aforesaid, and said complainants declare that defendant's coke was much inferior to Connellsville coke for their purpose of manufacturing pig iron; that, in fact, defendant's coke was not fit to be used in that manufacture unless mixed with Connellsville coke, but complainant also said at the same time that defendant's coke possessed certain desirable qualities, and that they could use it in their said manufacture by mixing it in certain proportions with Connellsville coke, and that they could then use it to advantage, defendant's coke being considerable cheaper, with cost of transportation added, than Connellsville coke, with cost of transportation added, which was owing to the fact that the latter had to be transported about 200 miles, while the former had to be transported only about 75 miles to the complainants' furnace, both by railroad.

Defendant says that at and before the time of the making of the contract aforesaid the complainants were paying for Connellsville coke, including charge for transportation, considerable more than

defendant's coke would and did in fact cost them, according to the said contract price, and that complainants did, in fact, for some time thereafter continue to pay such higher price for Connellsville coke to mix with West Fairmont coke (defendant's coke).

This defendant, further answering, denies that it was by its said contract bound or that it was otherwise bound to deliver to the said complainant coke of any fixed or prescribed quality or coke of merchantable quality or coke suitable or reasonably fit for use in the complainant's said furnace in the manufacture of pig iron. On the contrary, this defendant says that it contracted with the said complainant under the circumstances and with reference to the facts aforesaid and not otherwise—that is to say, upon the fact conceded and recognized, that the coke manufactured by this defendant at its coal mines at Fairmont aforesaid was not of excellent quality nor of good quality; that said coke was not fit or suitable to be used in the manufacture of iron, and that it could only be used in that manufacture after being prepared and rendered fit for use by the mixing therewith of Connellsville coke, which mixing, preparing, and rendering fit for use was a matter with which defendant had nothing to do and of which defendant knew nothing except as represented by the said complainant as aforesaid and by the said George Hardman, whose report and representations to the defendant in regard to the quality of said coke were substantially similar to those of the said complainant.

35 This defendant, its officers, agents, and servants, had not at the time of the making of said contract and have not now any knowledge whatever respecting the quality of said West Fairmont coke as respecting its fitness for use in the manufacture of pig iron or in any manufacture, except such knowledge as they derived from the said complainants and the said George Hardman, so that this defendant says in the making of said contract the defendant confided in and relied upon the representations made by said complainant and upon the knowledge derived from them in regard to the quality and value of said coke, and this complainant well knew at time of the making of said contract and they well know the same now.

Defendant, further answering, admits it to be true that defendant delivered coke to said complainants in varying quantities under said contract during the space of about fourteen months, until long after the time limited by said contract for the completion of the performance of said contract, during which period of time the defendant delivered to complainant about the quantity in the bill stated, leaving yet to be delivered according to said contract about the quantity in the bill stated. All the coke thus delivered was delivered by the defendants and was received, settled for, and paid for by the complainants under the said contract and in part performance thereof and strictly in pursuance of the terms thereof, except that the complainants did not nor would not receive said coke at an average rate of three car-loads per day, as by the terms of said contract they had promised and bound themselves to do; and the defendant denies that the said complainants have at all times or that they have at

any time been ready to receive or to pay for the said coke or any part thereof, which, according to the terms of said contract, yet remained to be received by them. Defendant denies that the said complainants have at any time requested to furnish or deliver to them, the said complainants or otherwise, the said remaining coke or any part thereof. On the contrary thereof, this defendant was at all times during the period of time limited by said contract and afterwards ready, willing, and anxious to furnish and deliver to the said complainant and offered to deliver to them and importuned them to receive any pay for all the coke by the terms of said contract required to be delivered according to the very terms and requirements thereof, but the said complainants during the period limited by said contract for the delivery and reception of said coke and afterwards constantly refused to receive the said residue
36 of the coke contracted for by them as aforesaid and still refused up to the time of the commencement of the said action at law brought by this defendant against them mentioned in said bill of complaint.

This defendant in fact says that from the time of the commencement of the delivery of said coke under said contract thence forward defendant delivered to complainants, from day to day and from time to time, all the coke that complainant would use or that they would consent to receive from defendant. The convenience and the necessities of the said complainants required that said coke should be delivered to them in varying quantities according as their business required them to consume it and according to their facilities of receiving, using, or taking care of and providing storage for the same.

This defendant at all times, so long as the said complainant continued to receive coke from defendant, was careful and diligent to furnish and deliver it in quantities and upon such days and times as it was required by the said complainants, and did so in fact deliver and furnish it. Defendant in fact and at all times delivered to complainant as much of said coke in quantity and made deliveries thereof as frequently as the said complainant required or permitted, and defendant never at any time omitted to deliver or desisted from delivering coke to the complainants under said contract, except upon the express request of complainants and to suit their necessities or their convenience. During the whole period of time that complainants continued to receive coke from defendants under said contract the complainants and the defendant so acted upon said contract that defendant made deliveries of coke in such quantities and upon such days and times as complainants required it, and upon notice or information given to defendants by the complainants of the quantities required from time to time, and this mode of acting upon and carrying out said contract by both the parties thereto was a thing of necessity and was for the mutual interest and convenience of the said parties, and especially for the interest and convenience of complainants, and the defendant says that it was wholly owing to the default of the said complainants that the whole of the coke contemplated and embraced in said contract was not delivered

within the time limited by said contract for the delivery thereof. Complainants failed to require and refused to permit the delivery of any greater quantity than that which was delivered by defendant as aforesaid.

37 Defendant denies that complainant suffered or incurred the losses by them in their said bill pretended and claimed or either of said losses or any part of either of them or any loss whatsoever by reason of any alleged or pretended failure of the defendant to deliver the said coke or any part thereof, and says there was no such failure on the part of this defendant, and that the allegation in said bill of complaint contained of failure of the defendant to deliver to the complainant four hundred and thirty-six car-loads of coke is wholly untrue.

And this defendant, further answering, denies that the 246 car-loads of coke received by complainants was of very inferior quality, and denies that it was of a quality different from or inferior to that which had been used by the said complainants prior to the making of said contract as aforesaid, or that it was wholly unfit for use in the manufacture of iron as in the said bill alleged, or that it was when properly mixed with Connellsville coke as aforesaid less fit for use in the said manufacture than the said coke of different manufacture which had been used and tested as aforesaid by complainants prior to the making of said contract; and defendant denies that the iron produced by the said complainant during the time they were using the said 246 car-loads of coke was of inferior quality, or that said iron was rendered inferior by the use of said coke, or that it was rendered inferior by reason of anything in the said coke contained unknown to the complainants at the time of entering into said contract.

Defendant denies that said iron was vitiated by the said West Fairmont coke used in its manufacture, and denies that said complainants are entitled to set off or recover against this defendant any sum of money on account of anything alleged or pretended in said bill in regard to the quality of said coke or of said iron.

Defendant says that all the coke delivered by defendant to the complainant was manufactured at defendant's coke ovens near Fairmont, at its coal mines called the West Fairmont mines, and this defendant denies that it did in any manner defraud, and especially defendant denies the allegation contained in said bill that it wilfully defrauded the said complainant in the manufacture of the said 246 car-loads of coke or in any part of the same, either in the manner in the said bill alleged or otherwise, but defendant says it is impossible to manufacture coke so that it shall always be perfectly uniform in quality, as complainants well knew, and therefore some

38 portion of said 246 car-loads may have been better than other portions.

The defendants, officers and servants, were at one time informed, shortly after the making of said contract, to wit, on or about the 13th day of December, 1872, at which time less than 100 car-loads had been delivered to complainants under said contract, that some of said coke had not given satisfaction, and that unclean material

had been used in its manufacture. Defendant thereupon immediately caused the use of said material to be discontinued, not knowing, however, whether or not it contained any deleterious matter, except upon the statement of complainants; and defendant moreover kept in its service the most skillful manufacturer of coke that could be procured, and here avers upon solemn belief that the great body or bulk of the coke furnished and delivered to complainants under the said contract was superior in quality to that which had been used and tested as aforesaid by complainants prior to the making of said contract, and defendant vouches the fact that, although complainant continued to receive, settle for, and pay for coke from the defendant from the said 13th day of December, 1872, from time to time, until on or about the 30th day of November, 1873; no word of complaint was ever, during that long period of time, uttered by complainant on account of any coke delivered subsequently to the said 13th day of December, 1872.

Defendant says that its great aim and intent was to manufacture and furnish to complainant the very best quality of coke that could be produced from that coal, and if any part of the coke so delivered to them by defendant was of any lower grade or quality than the best capable of being produced from said coal such inferiority was wholly unknown to defendant, its officers, agents, or servants, and resulted from such unavoidable and obscure agencies or accidents as are incident to the manufacture of coke, and not from inattention or negligence. Defendant here submits that by said contract the deliveries for each month were placed upon a separate and independent basis as respects exception to quality and as to all questions of quantity, and that each month's delivery having been settled for and paid for according to the contract, further inquiry as to quantity or quality is precluded.

But defendant, further answering, says that the true or principal reason, as defendant is informed and believes, why the iron manufactured by complainants mentioned in their said bill of com-
39 plaint was inferior in quality, if in fact it was so, is found in the fact that in its manufacture complainants used a much larger proportion of said West Fairmont coke on account of its great cheapness than could be safely or prudently used in that manufactured, as ascertained and determined by complainants themselves by their experiment and test of said coke aforesaid. Defendant states, upon information and belief, that complainants used the said West Fairmont coke almost exclusively in the manufacture of said iron which they alleged to have been of inferior quality, without mixing with it such proportion of Connellsville coke as they themselves had declared to be necessary.

This defendant avers that said 246 car-loads of coke were reasonably fit for the use for which it was intended; that it was of merchantable quality for the purpose for which it was intended by the parties to said contract—that is, for the purpose of being mixed with Connellsville coke by the complainants, and thus used in the manufacture of pig-iron. Defendant, further answering, utterly denies the pretence made in said bill of complaint to the effect that

complainants finally refused to receive any more coke than the 246 car-loads, because of its inferior quality; that pretence is utterly and wholly false. Defendant here repeats that from the 13th day of December, 1872, until the 30th of November, 1873, complainant received coke from defendant under said contract on many different days, in the aggregate over 146 car-loads, and paid for the same according to said contract without one word of complaint in reference to its quality. It is utterly untrue that the complainants made frequent complaint, as in their bill alleged, that the coke received was of poor quality. Every word of complaint made by them had reference to coke delivered prior to the 13th day of December, 1872. As late as December 4th, 1873, nearly one year after any complaint had been made by complainant of the quality of the coke delivered to them by the defendant, the complainant addressed a letter to defendant in these words:

"The West Fairmont Gas Coal Company, No. 77 and 83 Liberty St., New York, N. Y.; G. R. Van Allen, pres't.

"DEAR SIR: Yours of the 28th inst. was duly received. We were accumulating stock and stopped shipment from Fairmont and curtailed from Connellsville; have no definite idea at what time we shall again need.

"Yours truly, DEWEY, VANCE & CO."

40 And the defendant, further answering, says that the true and only reason for complainant's refusal to receive from the defendant the full quantity of coke contracted for by them as aforesaid is to be found in the letter of said complainant of January 9th, 1874, addressed to the president of the West Fairmont Gas Coal Company, in which, amongst other things, the complainant says:

"We stated, as a matter of interest, that we can contract for a year's supply of Connellsville coke on price and terms equivalent to your present offer—that is, the Connellsville will cost delivered here no more than yours."

Defendant here distinctly avers that the true and only reason for the complainant's refusal to receive from the defendant the whole of the coke so contracted for by them is and was that they found themselves able about the beginning of the year 1874 to contract for Connellsville coke at such rates that after paying charges of transportation the said Connellsville coke would cost them no more than the said West Fairmont coke would cost them under their said contract with defendant. Defendant says, in other words, that the said complainant having made use of defendant as a competitor of the manufacture of Connellsville coke, and having protracted the time of receiving coke from defendant far beyond the time limited by the said contract until the price of Connellsville coke declined to a figure which enabled complainants to purchase coke of the last-mentioned manufacture as cheaply as they could get West Fairmont coke from defendant under said contract, they chose to repudiate the obligation of said contract for their own pecuniary advantage.

Defendant, further answering, admits the bringing of said action of assumpsit in the circuit court of Ohio county, in the State of West Virginia, and its removal to this honorable court, and admits that the complainants, defendants in the said action at law, tendered certain pleas to said action which were rejected, as in the bill alleged; but defendant denies that the complainants have any matter of defense to said action of which they may not avail themselves in a court of law, and denies that they have any just defense either at law or in equity.

And the defendant, now answering in regard to its insolvency and the fraudulent conveyance of its property as alleged in said bill of complaint, admits that it conveyed its property to the West Fairmont and Marion Consolidated Gas Coal Company for the consideration in the deed of conveyance set forth.

41 The allegation contained in said bill that said conveyance was intended to delay, hinder, or defraud complainant in any way is false and foolish. The said West Fairmont Gas Coal Company does not owe a dollar on earth—has no creditors. Said conveyance was made in good faith, for full and valuable consideration, and without reference to the existence of complainants. Being a perfectly fair and honest transaction, it does not seem to be comprehended by the complainants. It is true that there existed until —— 187– two companies, the West Fairmont Gas Coal Company and the Marion Gas Coal Company, both engaged in mining and shipping coal, owning adjacent coal lands, separated only by a small stream; that the same persons mainly owned the stock of said companies; that the par value of the shares of the capital stock were different; that these companies concluded that it would be for the mutual and general advantage of their stockholders to consolidate; that they did organize a new company, the West Fairmont and Marion Consolidated Gas Coal Company, and conveyed their respective properties to said company, which issued shares of its capital stock to the stockholders of said two respective companies upon a just and equitable basis agreed upon by all the stockholders of both the original companies, so that each stockholder in the original company received stock of the new company equal in value to the value of the stock which he had held in either or both of the old companies. Neither of said original companies has any creditors; neither of them had any creditors at the time of said conveyance that was not fully provided for. This defendant denies all charges of conspiracy to defraud complainant or any other creditor or other person, and says that said charges were known by the complainants to be without any foundation in truth. The organization of the said new company and the conveyance aforesaid, together with every act and transaction involved therein, were made, done, and transacted without any intention whatever in reference to the said complainants, and without even so much as a thought of their existence.

And this defendant, having now answered as fully as it is advised is or can be material or necessary, prays that the preliminary in-

junction granted in this cause be dissolved, and that defendants be dismissed hence with costs, &c.

(Signed) GILBERT R. VAN ALLEN, *President.*

W. P. HUBBARD,
JAMES MORROW, JR.,
Solicitors.

Affidavit of G. R. Van Allen, president.

42 And on another day, to wit, on the 15th day of February, 1879, the following argument was filed in the clerk's office of said court, to wit:

Agreement.

In the Circuit Court of the United States for the District of West Virginia. In Chancery.

CHAUNCEY DEWEY *et al.*

vs.

THE WEST FAIRMOUNT GAS COAL COMPANY and Others.

Memorandum of agreement between the complainants and defendants in the above-entitled cause, made and entered into this 1st day of January, A. D. 1879.

It is agreed that depositions to be used as evidence in this cause may be taken by either party before a notary public, and without a commissions being taken out; that in taking such depositions the witnesses may be examined orally and publicly and be subject to examination, cross-examination, and re-examination; that the questions put and answers given may be taken in full; that before the taking of such depositions reasonable notice shall be given to the opposite party, or his or their attorney, of the time and place of taking the same, and that depositions taken in accordance with
43 this agreement may be read in evidence in this cause if free from other objections; it is also agreed that this memorandum may be entered of record in this cause.

JAMES MORROW, JR.,
Of Counsel for Defendants.
D. LAMB,
W. H. HEARNE, AND
HENRY M. RUSSELL,
Attorneys for Complainants.

And on another day, to wit, on the 7th day of July, 1879, the following bill was filed in the clerk's office of said court, to wit:

Cross-Bill.

To the judges of the circuit court of the United States for the district of West Virginia:

The West Fairmont Gas Coal Company, a corporation organized under the laws of the State of New York, and a citizen of the said

State of New York, brings this its bill against Chauncey Dewey, Charles P. Dewey, Albert Dewey, Orville C. Dewey, David M. Thornburg, James N. Vance, John D. Culbertson, Arthur C. McKee, Nathan Wilkinson, William L. Hearne, Frank J. Hearne, Lewis Jones, Charles Rahr, Joseph Dudley, James Nesbitt, Robert W. McClellan, Jacob Bowman, Frederick Linderman, Henry M. Babcock, Martin Smith, and James Belleville, surviving partners of the firm of Dewey, Vance & Co., of whom the said Chauncey Dewey, Charles P. Dewey, and Albert Dewey are citizens of the State of Ohio, and the remainder are citizens of the State of West Virginia.

And thereupon your orator complains and says that on and prior to the — day of ——, 1877, there was and there still is depending in this honorable court a certain action of assumpsit in which your orator is plaintiff and the defendants above named, who were sued by their firm of Dewey, Vance & Co., are defendants; which action of assumpsit was brought by your orator against the said firm of Dewey, Vance & Co., to recover of and from the said firm damages for and on account of the breach by the said firm of a certain simple contract before that time made and entered into by and between your orator on the one part and the said firm of Dewey, Vance & Co. on the other part, which said contract is in the said action of assumpsit by your orator avowed to be and in truth and in fact is as follows—that is to say:

44 On or about the 4th day of October, 1872, your orator contracted to sell and to deliver to the said firm of Dewey, Vance & Co. a certain large quantity of coke, to wit, an average of three car-loads of coke per day, from thence until the first day of July, 1873, for which the said firm agreed to pay your orator at the rate and price of six cents per bushel for each bushel of said coke of forty-one pounds and to settle for each month's delivery of said coke at the termination of such month and to execute and deliver to your orator the notes of the said firm at the first of each month for the amount of the next preceding month's delivery of the aforesaid coke at the rate and price per bushel aforesaid, payable at ninety days after the dates of such respective notes.

And your orator, in its said action of assumpsit, further averred that although your orator was at all times, from the day of entry into said contract until the said first day of July, 1873, ready and willing to deliver and at all times during the period fixed for the delivery of said coke offered to deliver the same to the said defendant according to the very terms of the said contract, yet the said firm of Dewey, Vance & Co. refused to receive and did not receive, settle for, or pay for the said coke according to its said contract, but that, on the contrary, the said firm unlawfully refused to receive, settle for, or pay for a large quantity of the coke as aforesaid contracted to be received and paid for by them, and also averred that because of the failure and refusal aforesaid of the said firm your orator had sustained damages in the amount of ten thousand dollars, all of which your orator now here avers to be true for the purpose of and as a part of this cross bill.

Your orator further avers that said action of assumpsit was origi-

nally commenced in the circuit court for Ohio county, in the said State of West Virginia, and there depended until the April term, 1877, of the said court, when, upon the application of your orator, the said action was removed to this honorable court of the United States for the district of West Virginia and docketed on the law side thereof to be further proceeded in, where the said action is still pending and undetermined; but your orator is at present enjoined from proceeding further in the prosecution of said action by the temporary injunction of this honorable court granted at the prayer of the said firm of Dewey, Vance & Co., as heretofore set forth.

Your orator further showeth that the said defendants, on the — day of October, 1877, filed their certain bill in chancery in this honorable court against your orator and G. R. Van Allen and the West Fairmont and Marion Consolidated Gas Coal Company (and praying leave also to make the stockholders of the said West Fairmont Gas Coal Company parties defendant when their names and places of residence shall be discovered). Whereby they pretend that they, the said defendants, meaning the said firm of Dewey, Vance & Co., were at all times ready and willing to receive, settle for, and pay for the said coke according to the contract hereinbefore set forth, but falsely pretending and alleging that the said coke was to be of good, merchantable quality, suitable for use in the fur-
45 nace of the said defendants in the manufacture of iron, if not equal in quality to certain coke which had, antecedently to the making of said contract, been sold and delivered by your orator to the said defendants, and which had been used by them in the manufacture of iron, and which they falsely allege to have been coke of excellent quality, and pretending also that your orator would not deliver to the said defendants a large remainder of coke of the same or similar quality as that contemplated by said contract nor coke reasonably fit for the use contemplated by the said parties to said contract at the time the same was made and entered into.

And pretending also that by reason of the inferior quality and impurity of the coke which was supplied by your orator to the said defendants in the partial execution of said contract, the manufactured product of said defendant was injured and made less valuable than the said product would otherwise have been, and also that the said defendant, by reason of the pretended failure of your orator to deliver to them four hundred and thirty-six car-loads of coke such as was contemplated by said contract, had sustained large damages, and praying not only that your orator should be perpetually enjoined from prosecuting its said action at law against said defendants, but that said defendants' said claim for damages may be established, and the amount thereof decreed against your orator, and praying also that a certain deed of conveyance made by your orator to the said West Fairmont and Marion Consolidated Gas Coal Company might be declared null and void and set aside as to said pretended claim of the said defendants upon the pretended ground set up in said bill, — was and is a fraudulent device to prevent the collection of said pretended claim.

All the foregoing matters, your orator says, will fully and at large

appear, the reference being had to the proceedings taken and had in said action at law and in said suit in chancery, which are of record in this honorable court.

Whereas your orator charges, on the contrary, of the matters and allegations contained and set forth in the said bill of complaint of the said defendants that the said contract was and is as the same is by your orator herein before pleaded and set forth and not otherwise.

That it is not true, as pretended by the said firm of Dewey, Vance & Co., that your orator contracted to deliver to the said firm coke of merchantable quality equal or similar to a certain quality of
46 coke which had before the making of said contract been sold and delivered by your orator to the said firm and used by them in the manufacture of iron, nor coke fit or suitable to be used in the manufacture of iron in the sense in which the said firm pretended.

That it is not true, as the said firm pretended, that the coke of your orator's manufacture used by said firm before the making of said contract was coke of "excellent quality."

Your orator avers the truth to be that until recently, before the making of said contract, nothing was known, as your orator is informed and believes, certainly nothing was known to your orator, in regard to the quality or value of the coke which might be manufactured from the coal field then owned by your orator near Fairmont, in Marion county, in the State of West Virginia; that all coke is manufactured from coal, so far as your orator knows, and that the quality and value of coke is dependent almost exclusively upon the properties of the coal from which it is manufactured.

That recently, before the making of said contract, your orator manufactured some coke from coal taken from its said mines at Fairmont, which your orator believes is the first coke ever manufactured from coal mined at or near that place. A quantity of said coke was shipped to said firm of Dewey, Vance & Co., to be used by them at their furnace, near the city of Wheeling, in the manufacture of iron as an experiment, the same being received and used by said firm as an experiment made by them for the purpose (chiefly) of testing its value, and, in general, the value of Fairmont coal for coking purposes, and the said firm well knowing that your orator neither knew nor pretended to know anything whatever in regard to the quality of said coke or its utility, fitness, or value in the manufacture of iron or in any manufacture.

That said firm of Dewey, Vance & Co., having used and tested said coke with special reference to the determination of the question of its fitness for use in their manufacture, pronounced it to be coke not of excellent quality, as they now falsely pretend, but of inferior quality, unfit to be used in the manufacture of iron unless when mixed with Connellsville coke, which is of the most excellent quality, in such proportions as would neutralize or overcome its deleterious properties. Such was the information given to your orator by the said firm of Dewey, Vance & Co. after having tested and experimented with said coke, and this was the only information

which your orator or any of its officers, agents, or employés possessed at and before the time of entering into said contract,
47 with the sole exception of a precisely similar report of its qualities which your orator about the same time received from an iron manufacturer named George Hardman, who had similarly experimented with some of your orator's manufactured coke.

Your orator avers that said firm of Dewey, Vance & Co., after having received, settled for, and paid for a large quantity, to wit, 246 car-loads, of the coke in said contract contemplated, finally refused to receive any more, leaving 436 car-loads yet to be received by them, which they at all times since and still refuse to receive or pay for.

Your orator says it is true that the said 246 car-loads were not, in fact, delivered at the average rate of three car-loads per day, but this was solely owing to the said firm, which did not nor would — receive coke from your orator in greater quantities nor at any other times than the quantities in which and the times at which it was, in fact, delivered to them by your orator. Your orator at all times after the making of said contract, delivered to the said firm all the coke that they would receive from your orator.

That the coke actually delivered to the said firm by your orator under the contract was of your orator's own manufacture and of the kind and quality contracted to be delivered, and that the said firm continued to receive and settle for and pay for coke under said contract until long after the expiration of the time limited by said contract for the delivery and reception of the whole amount intended by the contract, to wit, until the 30th day of November, 1873, your orator being willing and at all times ready to go on with the execution of said contract and continue the delivery of coke to the said firm as rapidly and in the largest quantities that the said firm would receive or permit your orator to deliver, even though the time had expired within which the said firm could have required your orator to go on with the execution of said contract, solely by reason of the failure and refusal of the said firm to receive from your orator or permit your orator to deliver an average of three car-loads of coke per day or to deliver any greater quantity than your orator did actually deliver.

Your orator says that the coke so manufactured and delivered by said orator to said firm of Dewey, Vance & Co. was merchantable, fit, and suitable for the purpose for which it was contracted and delivered, and that the coke yet to be delivered in order to have completed the execution of said contract on your orator's part,
48 which was partly manufactured and partly in process of manufacture, and as the other part, of which the manufacture had not yet been commenced at the time the further execution of said contract was prevented by the act of said firm, would have been, and, so far as the same was already manufactured, was and is in like manner merchantable, fit, and suitable for the purpose for which the said coke was intended, to wit, to be mixed with Connellsville coke in proper proportion, and to be thus used in the manufacture of iron in the furnace of the said Dewey, Vance & Co., and

was equal in quality to the said 34 car-loads first delivered to the defendants. Your orator says that its manufacture of coke was by said firm alleged to be unmerchantable, unfit, and unsuitable for use in the manufacture of iron, except when so mixed according to a rule and in a proportion which the said firm professed to understand, and of which your orator neither knew nor pretended to know anything, and all this before the making of said contract and after the trial and test of the said coke which the said firm had made, the results of which were accurately known to the said firm alone, and were known to your orator only so far as the same had been voluntarily communicated to your orator by the said firm.

Your orator says that immediately — having entered into said contract, and relying upon and confiding in the said promise and undertaking of the said defendants to receive and pay for all the coke contemplated by said contract, your orator proceeded to erect and did erect at its mines near Fairmont aforesaid a large number of coke ovens suitable and necessary for the manufacture of the coke which your orator had so contracted to deliver to the said defendant, and thereon incurred a large expenditure of money, to wit, five thousand dollars, which became a loss to your orator by reason of the failure and refusal of the said defendants to comply with their contract aforesaid, which damages are in addition to the damages hereinbefore complained of by your orator.

In consideration of the premises your orator prays that an enquiry be made of the damages sustained by your orator in consequence of matters aforesaid in such manner as shall seem most agreeable to the usage and practice of this honorable court of equity, and that the said firm of Dewey, Vance & Co.—that is to say, the surviving members of said firm—may be decreed to pay the amount of such damages to your orator, together with your orator's costs of this suit, and that your orators may have all such other, further, and different relief as the nature of the case demands and as to equity may seem meet.

49 May it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America, to be directed to the said Chauncy Dewey, Charles P. Dewey, Albert Dewey, Orville C. Dewey, David M. Thornburg, James N. Vance, John D. Culbertson, Arthur C. McKee, Nathan Wilkinson, William L. Hearne, Frank J. Hearne, Lewis Jones, Chas. Rahr, Joseph Dudly, James Nesbitt, Robert W. McClellan, Jacob Bowman, Frederic Linderman, Henry M. Babcock, Martin Smith, and James Bellville, surviving partners of the firm of Dewey, Vance & Co., thereby commanding them and every one of them, at a certain day and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet; and your orator will ever pray, &c.

50 And on another day, to wit, on the 13th day of January, A. D. 1880, the following order was passed and entered of record, to wit:

THE WEST FAIRMOUNT GAS COAL COMPANY
vs.
DEWEY, VANCE AND COMPANY.
} In chancery & upon a cross-bill.

This day came the defendants in the above-entitled cause and filed their demurrer and answer to the cross-bill of the West Fairmount Gas Coal Company.

The demurrer and answer referred to in the foregoing order is in words and figures following, to wit:

In the Circuit Court of the United States for the District of West Virginia.

THE WEST FAIRMOUNT GAS COAL COMPANY

vs.

DEWEY, VANCE AND COMPANY.

Cross-suit.

The demurrer and answer of Chauncey Dewey, Charles P. Dewey, Albert Dewey, Orville C. Dewey, David M. Thornberg, James N. Vance, John D. Culbertson, Arthur C. McKee, Nathan Wilkinson, William L. Hearne, Frank J. Hearne, Lewis Jones, Charles
51 Rohr, Joseph Dudly, James Nesbitt, Robert N. McClellan, Jacob Bowman, Frederick Linderman, Henry M. Babcock, Martin Smith, and James Bellville, surviving partners of the late firm of Dewey, Vance and Company, to the cross-bill exhibited against them by the West Fairmount Gas Coal Company.

For demurrer to said cross-bill these defendants say—

1st. That the statement in the said cross-bill of the pretended damages therein alleged to have been suffered by the complainant is too indefinite and uncertain, and therefore these defendants should not be required to answer thereto.

2d. That the relief asked for and the case made by the said cross-bill is identical with these asked for and made in the action at law therein referred to, and the complainant cannot maintain the said cross-bill without having first dismissed the said action at law; and these defendants, not waiving any exception to the said cross-bill on account of the many errors and imperfections therein contained, for answer to so much thereof as they are advised it is necessary for them to answer, say:

The allegations of the said cross-bill are true with reference to the institution and various steps taken in the action at law
52 therein mentioned and as to the allegations made by plaintiffs in said action, but these defendants deny the statement in the cross-bill that all the allegations made in said action by the plaintiff therein are true.

The allegations of said cross-bill are also true with reference to the institution and general nature of the suit in chancery in which the said cross-bill is filed, but the said cross-bill does not state fully the various matters contained in the bill in said suit, and these defendants here refer thereto.

The allegations in the said cross-bill as to the contract between the said firm of Dewey, Vance and Company and the West Fairmount Gas Coal Company, and the damage to said firm by reason of the breach thereof, are as to the matters which are fully set forth in the original bill filed by these defendants in this suit, and these defendants here repeat the allegations set forth in said original bill, and pray that the same may be read as part of this answer.

As to the allegations in said cross-bill that the complainant knew nothing until recently before the making of the contract about the quality or value of the coke which might be manufactured from the coal field then owned by the said last-mentioned com-
53 plainant near Fairmont, these defendants know nothing, except that these respondents say that about the last of August, A. D. 1872, and before the said contract was entered into, Mr. Van Alen, the then president of the said West Fairmount Gas Coal Company, came to the office of respondents' said firm, in the city of Wheeling, and introduced himself to some of the members of said firm, and stated that his company was manufacturing coke at Fairmont. He had a sample with him of the coke they were making, which was as handsome a sample as the last-mentioned members of said firm had ever seen. Mr. Van Alen himself seemed to be an intelligent gentleman and well posted on the subject of coke; he stated that this coke was a very heavy and strong coke, outweighing Connellsville coke several pounds. On that day the said firm received their first knowledge from Mr. Van Alen himself of the manufacture of coke at Fairmont. Mr. Van Alen said that the coke had been used by several parties for various purposes, and among them named Mr. George Hardman. By reason of Mr. Van Alen's representations and the sample exhibited as aforesaid respondents' firm were induced to make an arrangement for
54 a trial lot of said coke to be used in their furnace. This trial lot was used at respondents' furnace in varying proportions and with satisfactory results. On the 4th day of October, 1872, Mr. Van Alen again came to the office of respondents' firm and either then or at the August conversation represented that complainant's coke would be found low in sulphur, and that experiments had been made with the coal from which the said coke was manufactured and comparison with other coals in reference to sulphur. Respondents' firm had on the said 4th day of October, 1872, no information or knowledge about Fairmont coke other than that derived from the statements of Mr. Van Alen and the use of the said trial lot. Respondents refer again to their original bill in this cause for the statement of their contract and the succeeding circumstances.

Respondents therefore say that it is not true, as in the said cross-bill is alleged, that their said firm well knew that the complainant

neither knew nor pretended to know anything whatever in regard to the quality of the said coke or its fitness, utility, or value in the manufacture of iron, or in any manufacture.

It is not true that, as in the said cross-bill alleged, the respondents' said firm, after using the said trial lot of coke, pronounced
55 it to be not of excellent quality, but of inferior quality and unfit to be used in the manufacture of iron unless when mixed with Connellsville coke in such proportions as would neutralize or overcome its deleterious properties; nor is it true that any such information was given to the complainant by respondents' said firm. Respondents aver the truth to be that at no time was any distinct proposition made by complainant to supply respondents' firm with enough coke to supply their whole consumption, which was at the rate of eight car-loads daily. In the early negotiations the precise amount of coke which complainants would be able to supply was not stated, but it was stated that the supply would be limited at first and until the completion of certain new ovens which, it was represented, were expected to be completed on the 20th of September, 1872. It was the expectation of defendants' firm to use complainant's coke in the proportion of one-half Fairmont and one-half Connellsville, and to be able to get from complainant coke in quantities sufficient for that purpose, and afterwards expected to be able to use Fairmont coke exclusively. Respondents file herewith a copy of a letter sent on the 20th day of September,
56 1872, by their firm to the complainant. The copy is marked "Exhibit Z," and respondent prays that it may be taken and read as part of this answer. Respondents say that on the 28th day of September, 1872, after the trial lot had been partly used, this firm were still without information as to the amount which complainants could furnish, and wrote a letter to Mr. C. Jackson, who was then the superintendent of complainant's work at Fairmont, enquiring as to the quantity which could be furnished, a copy of which letter is filed as a part of this answer and marked Exhibit "Y;" and these respondents say that when the contract of October 4th, 1872, was entered into the amount of coke to be supplied was limited to three car-loads daily, not because respondents' firm had found or supposed that complainant's coke was of inferior quality, but because the capacity of complainant's works was limited, as no proposition was made by complainant that respondents' firm should take their whole supply of coke from complainant's works; it did not become necessary for said firm to make up their mind definitely as to whether they would do so or not, and they might well have hesitated
57 to substitute a new article, of which their knowledge was limited exclusively, in place of coke, which they had long used, and with the qualities of which they were perpectly familiar; but respondent repeats that the trial lot of Fairmont coke was, so far as they could judge, of excellent quality, and that their said firm never represented it as otherwise.

Respondents know nothing of the erection by the complainant of new ovens for the manufacture of coke, as in the said cross-bill is alleged, but they deny that they or their said firm was in anywise

instrumental in causing damage to the complainant in that or any other manner, as in the said cross-bill is claimed. Respondents again refer to their original bill as an answer to all the allegations of said cross-bill not hereinbefore specifically answered; and now, having fully answered, they pray, &c.

D. LAMB,
W. H. HEARNE &
H. M. RUSSELL,
Attorneys for Respondents.

STATE OF WEST VIRGINIA, *Ohio County,* } ss:

J. N. Vance, one of the defendants named in the foregoing answer, being duly sworn, says that the facts and allegations therein
58 contained so far as they are stated on his own knowledge are true, and so far as they are stated on information he believes them to be true.

J. N. VANCE.

Taken, sworn to, and subscribed before me this 12th day of January, A. D. 1880.

R. C. BENHAM,
Notary Public.

Exhibit Z, referred to in the foregoing answer, is in words and figures following, to wit:

Copy book, page 647.

WHEELING, W. VA., 20 *Sept.*, 1872.

Fairmount Coke Co., Fairmont, W. Va.

GENTLEMEN: We have been unable thus far to test your coke, but hope to do so very thoroughly, and therefore desire a shipment of about 40 cars instead of 20. Forward a larger number daily than you have done, as we are compelled to store it until all have been received. It is our intention to work it with one-half Connellsville, and, if found satisfactory, to then work it alone. Our daily consumption is about eight cars, hence the necessity for more
59 than twenty cars in order to test it impartially.

Yours truly, DEWEY, VANCE & CO.

Exhibit "Y," with answer, is in words and figures following, to wit:

SEPT. 28TH, 1872.

C. Jackson, Esq., ag't, Fairmont, West Va.

DEAR SIR: I commence this week using a portion of your coke in connection with Connellsville & Steubenville coke, about one-third of each. My experience as yet is to- limited to judge with positive certainty of the results, but so far we see nothing to condemn its use. As we are without any certain understanding as to what it is going to cost, and as we have a contract for Steubenville

coke, which will expire in December, we would like, before making arrangements for a full supply elsewhere, to learn definitely what you can do towards supplying us, both as to price and quantity. The Steubenville coke, which we would propose to have yours take the place of in the future, is costing us now $8\frac{2}{10}$ per bushel
60 at the furnace. We sup-ose we could use steadily four cars per day of yours at price and quantity to suit.

Very truly yours,

DEWEY, VANCE & CO.

On the 31st day of May, 1880, the following depositions on behalf of complainant and defendants were filed in the clerk's office of said court, to wit:

Deposition for Complainant.

Depositions taken in Wheeling, W. Va., June 13th, 1879.

Appearances: H. M. Russell, Esq., solicitor for complainants, and W. P. Hubbard, Esq., solicitor for defendants.

At which time and place came FRANK J. HEARNE, a witness of lawful age, who, being first duly sworn, says:

Examination by H. M. RUSSELL:

Q. 1. What is your age, residence, and occupation, and connection, if any, with this suit?

A. My age is 32; residence, Wheeling, Ohio county, West Virginia; occupation, general manager of the Riverside Iron Works; I was a member of the firm of Dewey, Vance & Co.

Q. 2. Where were you and how engaged in the summer and fall of the year 1872 and the first half of the year 1873?

A. I was attending, at least assisting, my father in connection with the operation of the Riverside Blast Furnace, the property of the firm of Dewey, Vance & Co; I was assistant general manager for Dewey, Vance & Co., my duties being in the mill and factory as well as the furnace.

61 Q. 3. What were your duties in connection with the furnace and to what extent did they require your presence and attendance at the furnace during that period?

A. My duties were to have general oversight over the operation of the furnace and all the accessories; I was present at the furnace a large part of the time; I suppose my presence at the furnace will average a half day each day.

Q. 4. Please state all that you know about the use, during that period and afterwards, of coke received by your firm at their furnace from the West Fairmount Gas Coal Co.

A. During the month of September, '72, and the early part of October, we received a trial lot of coke from the West Fairmount Gas Coal Company—34 car-loads. We used this in the furnace, beginning, I think, using about the one-fifth or one-fourth, with the remainder Connellsville coke; the results being satisfactory we increased the percentage of Fairmont coke to one-third, and, I think, for a short

time one-half. About or on the 4th of October our firm made a contract or agreement with Mr. Van Allen, of the West Fairmount Gas Coal Company, for three cars of coke daily to the first day of July, '73. The shipments of coke followed the trial shipments without intermission, to the best of my knowledge, and our consumption of coke was continued at the rate of one-third Fairmont with two-thirds Connellsville, until we discovered, from the bad working of the furnace, the diminished quantity of iron produced, and the deteriorated quality of iron caused by the inferior quality of the coke, that it was necessary to reduce the percentage of Fairmont coke. We continued reducing the percentage of Fairmont coke until we had entirely discontinued its use. We made complaints to the West Fairmont Gas Coal Company concerning the quality of the coke and requested them to discontinue the shipments. The suspension of shipments continued about thirty days and were then renewed, and we were not able at any time after that to use more than one-sixth of the Fairmont coke in our mixture. We would have been able, had the quality of the coke shipped us on the contract been equal to the sample—the 34 car-loads—to use one-third or one-half Fairmont coke in our mixture with satisfactory results.

Q. 5. During what period was the lot of 34 car-loads mentioned by you consumed in your furnace?

A. Most of it was consumed in October, 1872. We commenced the consumption about the last of September and continued it into October.

62 Q. 6. What quantity of iron did your furnace yield per day in September and October, 1872?

A. I think about from fifty to sixty tons per day.

Q. 7. What was your daily production from thence to July 1st, 1873?

A. During December, I remember, after the removal of the Fairmont coke from our burden, our average was about sixty tons per day, and the production continued nearly at that amount during the succeeding months until the latter part of March, when the furnace was blown out for repairs and remained out of blast until June, 1873. Our production during latter part of October and the month of November, 1872, was less than at any portion of the period.

Q. 8. What was your average consumption of coke of every kind during the period referred to while in blast?

A. About nine car-loads daily.

Q. 9. At what time and how did the bad quality of the Fairmont coke begin to manifest itself?

A. By the excessive fumes of sulphur in the casting-house when flushing cinder or at casting times, and by the interruption of the normal working condition of the furnace by reason of scaffolds in the furnace causing the stock to descend irregularly, and in the resulting of the production of a rotten, red, short iron, a large portion of it being white and mottled; I think about the middle or latter part of October, to the best of my recollection.

Q. 10. Please explain the terms "flushing," "cinder," "scaffolds," and "rotten, red, short iron."

A. "Flushing" is the act of opening the furnace for purpose of withdrawing the cinder; it usually occurs at the intervals of about an hour. "Casting" is the act of drawing the iron from the furnace, which occurs at the intervals of about eight hours. The "cinder" consists of the impurities or refuse matter contained in the coke, limestone, and iron ore; and, being lighter, floats upon the surface of the iron while the iron is being separated and collected in the bottom of the furnace; the volume of cinder is usually several times that of the iron, and hence the frequent removals or flushing of it. A "scaffold" consists of a mass of stock adhering to the wall on the inside of the furnace and interrupts the regular descent of the stock. Sometimes scaffolds occur on opposite sides of a furnace and increase by the accumulation of stock until they join and form what is called a bridge; this usually results in a stoppage of the furnace, and blasting and shoveling and extraordinary costs for repairs.

There are three grades of pig iron—known as "red short," "cold short," and "neutral;" the grade manufactured at the Riverside Furnace was "red short;" by "rotten red short" we mean a weak and inferior quality of red short.

"Red short iron" is that grade of iron which, when forged at a cherry-red heat, is weak, but is strong and fibrous when cold.

"Cold short iron" is strong at a cherry-red heat and weak and crystalline when cold.

"Neutral iron" is strong and fibrous both hot and cold. A "rotten red short iron" is weak at a cherry-red heat, and, unlike a red short iron, is weak when cold.

Q. 11. What was at that time the comparative value of white or mottled iron with that of good red short iron?

A. A difference, I think, of four or five dollars per ton in favor of gray iron; the gray iron being more valuable.

Q. 12. What kind of iron was made while you were using the first thirty-four car-loads of Fairmont coke?

A. The iron was good—good quality.

Q. 13. What was your experience during that period with reference to scaffolds in the furnace and sulphur fumes when the cinder was flushed?

A. I noticed nothing unusual.

The examination of this witness is here suspended by counsel, pending the examination of the witness next hereinafter mentioned.

LOUIS F. STIFEL,
Notary Public.

At the same time and place came JAMES H. MCCUNE, another witness of lawful age, who, being first duly sworn, says:

(Examination-in-chief by H. M. RUSSELL:)

Q. 1. State your age, residence, and occupation.

A. My age is 37; residence, North Wheeling; occupation, founder of blast furnace.

Q. 2. How long have you been engaged as founder of blast furnaces, and where?

A. About seven years and a half; at Mingo Iron Works, at LeMonte furnace, Fayette county, Pennsylvania; at furnace of Dewey, Vance & Co., called Riverside furnace; at Belmont Iron and Nail Works; at Top Mill furnace of Wheeling Iron and Nail Works; that was the last. I have frequently been engaged at the Eliza furnace, in Pittsburgh.

64 Q. 3. Where and how were you engaged from the summer of 1872 until July 1st, 1873?

A. I was engaged at the Riverside Iron Works of Dewey, Vance & Co., as founder of their blast furnace.

Q. As such founder at Riverside furnace, what were your duties?

A. In the first place, to take charge of all men working about the furnace and give directions with regard to filling of the stock into the furnace; the burdening of the furnace, of course, judging the proportions of each kind of stock that was necessary to go into the furnace; regulating blast and heat. There may be a great many small items that might be mentioned, but those are the principal duties.

Q. 5. Please state all you know with reference to the use during and after that period of coke received from the West Fairmount Gas Coal Company and used in the Riverside furnace.

A. With regard to the date of that I haven't them exactly; but I was first instructed that they would receive a number of cars of coke for trial, known to me as Fairmount coke. I commenced using it in small proportions, increasing the quantity until I got to one-third of the amount of coke used. The coke worked satisfactorily in the furnace, not injuring the working of the furnace nor the iron. After the trial lot was done we continued to use the coke, but not with good satisfaction; the furnace commenced to work badly, caused, in my opinion, by the large amount of sulphur in the coke, decreasing the daily product of the furnace and injuring the quality of the iron. Well, I kept complaining continually to Mr. Hearne of the quality of the coke. We decreased the proportions of it gradually, until at last we quit using it altogether. Our furnaces did not give satisfaction while we were using it after the trial lot.

Q. 6. In what way did the poor quality of the Fairmont coke, after the trial lot, decrease the production of the furnace?

A. The large amount of sulphur in the coke caused slipping, scaffolding, and unregular working of the furnace, and the sulphur injuring the quality of the iron.

Q. 7. How did the sulphur in the coke cause the scaffolding and slipping of the furnace?

A. Sulphur will kill combustion; it's both injurious to combustion and to the metal produced. It also affects the separation
65 of the iron, and will cause an unseparated mass to remain in the trough or runner on the outside of the furnace, which is a mixture of iron, sulphur, and other impurities, which is a loss to the iron manufacturer, of course, because it is injurious to the combustion. With regard to the working of sulphur in the stock

going into a blast furnace, we might say it is impossible to work it, only to a certain extent.

Q. 8. What effect did the superfluity of sulphur in the coke have upon the iron produced?

A. The scaffolding and slipping caused in the furnace by the sulphur in the coke cools the hearth of the furnace, makes the iron white. When the iron is gray the sulphur injures the iron for mill use.

Q. 9. What kind of iron was produced during the use of the sample lot of Fairmont coke?

A. Principally gray forge iron.

Q. 10. What was its quality?

A. The quality was gray forge—that answers that question—such as is required in a nail mill.

Q. 11. How did the presence of sulphur in the coke, after you had finished with the trial lot, manifest itself?

A. Why, I guess, that has been answered about twice; by causing slipping, scaffolding in the furnace, and injuring the quality of the iron.

Q. 12. Was there any other way in which you could detect the presence of sulphur in the coke; if so, what was it?

A. Not positively.

Q. 13. What was the appearance of the sample lot of Fairmont coke as to its quality, so far as its quality could be judged of from its appearance?

Objected to, it not being shown that the quality could be judged of in that way.

A. It had the appearance of a first-class coke, fully equal, if not better, than the Connellsville.

Q. 14. To what extent, if at all, can the quality of coke be judged of by its appearance?

A. You can tell whether the coke is well burned or not, and you can also see when there is much slate mixed with the coal that it's made from; that's about all that you can tell from appearance.

Q. 15. How did the Fairmont coke received after the trial lot compare in the two particulars of seeming to have been properly burned and to be free from slate with the coke received in the trial lot?

66 A. My recollection of that is not clear enough to give an answer to that.

Q. 16. How did the furnace work and what was the quality of iron produced after you discontinued the use of the Fairmont coke?

A. The furnace worked well, and the quality of the iron was excellent after discontinuing the Fairmont coke, and the production large.

Q. 17. What was the average daily consumption of coke of all kinds in the furnace during the time that you were using the Fairmont coke?

A. The records of the furnace would show that better than I could give it.

Q. 18. Can you approximate the amount?

A. About 5,000 bushels; about eight car-loads per day.

Q. 19. How many days of the week did the furnace run?

A. Seven days.

Q. 20. How many days of the week did you receive deliveries of coke?

A. Six days of the week.

Q. 21. What effect, if any, did the sulphur which was in the Fairmont coke after the trial lot have upon the fumes arising from the discharges from the furnace?

Objected to as leading.

A. That's a pretty hard question to answer. The fumes arising from the slag that passed off from — furnace were unusually strong from sulphur.

Q 22. What other coke besides the Fairmont did you use while you were using Fairmont coke?

A. Connellsville coke.

Q. 23. What was the quality of the Connellsville coke which you used?

A. The quality was good so far as I could tell.

Q. 24. To what extent, if at all, was the firm, Dewey, Vance & Co., injured by the bad quality of the Fairmont coke used by it after the trial lot?

Objected to; witness has not shown sufficient information to be able to speak to that.

A. It would be better for some one who has the figures of production of the furnace, and so on, to answer that.

Cross-examination by W. P. HUBBARD, Esq.:

Q. 1. State, as nearly as you can, when the Riverside furnace commenced to use Fairmont coke.

67 A. It was either early in October or November, 1872.

Q. 2. How long after you began to use it was it that you got the percentage of Fairmont coke up to one-third?

A. I couldn't tell exactly; my impression is that it was within a week from the time we commenced to use it.

Q. 3. Did you ever use a larger proportion than one-third of Fairmont coke?

A. Not regularly.

Q. 4. If at all, when did you do so and for how long?

A. I remember of them having placed a car on the wrong side of the stock-house and unloaded a part of it before I discovered the mistake, which covered the Connellsville coke up, so that I was compelled to use the mixture for two or three hours, so that I did not know exactly what proportions I had; it never happened at any other time that I am aware of.

Q. 5. Then is it true that not more than a third of Fairmont coke was ever intentionally used in that furnace?

A. It is.

Q. 6. For how long after you commenced using Fairmont coke did the furnace work satisfactorily?

A. During the whole time we were using the trial lot of coke.

Q. 7. How long was that to the best of your recollection?

A. Well, I have no recollection of the length of time at all.

Q. 8. How long a time intervened between the receipt of the last of the trial lot and the first of the next?

A. I haven't any recollection of that either; my recollection is that Mr. Hearne consulted me concerning the working of the coke about the time we were finishing the trial lot. I told him I thought we could work about one-third regularly. In a few days they were shipping again.

Q. 9. When did you quit using Fairmont coke altogether?

A. I can't give the date.

Q. 10. About how long was it after you commenced using the coke?

A. I couldn't tell you; it wasn't my business at that time to keep the dates.

Q. 11. State, as near as you can, how long it was from the time you commenced using the coke until you quit.

A. Three and a half or four months.

Q. 12. After you quit using it that time how long did the furnace continue to work well and produce good iron?

A. As long as she remained in blast—that is, during blast, until March or April, 1873.

68 Q. 13. How long was the furnace idle?

A. Two months, more or less.

Q. 14. After it resumed how did it work and what kind of iron did it make?

A. The furnace worked tolerable well; the quality of iron, I guess it was good; just after the start it was good. We used Fairmont coke at times during that blast, and whenever we used Fairmont coke we had difficulty, both from working of the furnace and quality of the iron.

Q. 15. How long did that blast continue?

A. A little less than a year and a half.

Q. 16. How often during that time did you use Fairmont coke?

A. I couldn't give you any idea; I couldn't tell that.

Q. 17. At the beginning, middle, or end of the blast?

A. It was not at the beginning; I cannot tell how soon after the beginning; do not know how long it was before the end.

Q. 18. About how many different times during that blast did you use that coke?

A. We kept no record — what kind of coke we had on the furnace; whether it was Connellsville or Fairmont it would be impossible for me to tell that from recollection.

Q. 19. After you began using the Fairmont coke during that blast did you stop using it before you went out of blast?

A. We did.

Cross-examination of McCUNE:

Q. 22. About how long after you began using it was it that you stopped using it?

A. We stopped about two and a half months after the blast commenced for a certain purpose; don't know whether we used it after that or not.

Q. 23. While you used Fairmont coke during that blast what proportion of it did you use daily?

A. Proportions were small, but I can't give the exact proportions; they were small and varied.

Q. 24. State as near as you can.

A. It varied from one-sixth to one-fifteenth.

Q. 25. About how much Fairmont coke did you use during the whole of that blast?

A. I don't know.

Q. 26. Have you any idea about it?

A. I have not.

69 Q. 27. Did not the furnace use Fairmont coke between January and March, 1873, when you say the furnace worked well and made excellent iron?

A. I don't remember of using it; if we did at all, we used it in very small proportions; my recollection is that we didn't use Fairmont coke at all after we had once quit using it.

Q. 28. Why did you recommence at any time the use of Fairmont coke?

A. I can't answer that question; I was always opposed to using it after it failed after the first trial; only used it when ordered to do so by Mr. Frank Hearne.

Q. 29. Had you let him know that you were opposed to the use of it?

A. Yes, sir.

Q. 30. Do you know why he continued to use it?

A. No.

Q. 31. Was it not because it was cheaper than the Connellsville coke?

A. I couldn't tell; I gave my answer, no, with regard to that.

Q. 33. Didn't Mr. Frank Hearne tell you it was cheaper?

Objected to unless the time was fixed.

A. I can't recollect whether he ever gave me the prices of the coke or not.

Q. 34. Whether he gave you the prices or not, didn't he tell you that the Fairmont coke was cheaper than the Connellsville coke?

A. I don't remember of him telling me anything of the kind.

Q. 35. Did you know anything about the prices of coke, Connellsville or other, during the year beginning September, '72?

A. I didn't at that time know anything about the prices of coke.

Q. 36. Do you know now whether during that year there was any change in the market price of coke?

A. Not positively.

Q. 37. Do you know whether there was any such change between September, '72, and January, '74?

A. I don't remember the date when coke commenced to decline in price.

Q. 38. You say in your examination-in-chief, speaking of the first blast in which you used the Fairmont coke, that you kept complaining continually to Mr. Hearne of the quality of the coke. Was that Mr. Frank Hearne?

70 A. It was Mr. William L. Hearne, particularly, and a good deal Mr. Frank Hearne—whichever happened to come to the furnace.

Q. 39. For how long a time did you make those complaints?

A. Until they quit using the coke in that blast.

Q. 40. Do you know about how long a time that was?

A. That is the same question we had trouble about before; I can't answer it any nearer now than before.

Q. 41. What was done with the iron made while you used the Fairmont coke?

A. It was shipped to Wheeling, to the Riverside mill, owned by the same parties that owned the furnace; do not know what use was made of it.

Q. 42. Did Dewey, Vance & Co.'s mill at that time use all the pig iron made by their furnace or did they sell some to other parties?

A. I can't remember whether they sold any iron at that time or not.

Q. 43. When they sold other parties did they deliver iron at their furnace or ship it to their own mill?

A. They deliver it at the furnace.

Q. 44. Wasn't the iron that they shipped to their mill used in that mill?

A. I could not tell where it was used.

Q. 45. Did the test made of the Fairmont coke continue long enough to inform you what proportion of it you could safely work?

A. Yes, sir.

Q. 46. Didn't you know before you tested it that it contained a great deal more sulphur than the Connellsville coke?

A. No, sir.

Q. 47. Did you know that it contained any more?

A. No, sir.

Q. 48. For what purposes was the test made?

A. To see if the coke would work successfully in a blast furnace.

Q. 49. What causes of difficulty did you suppose might exist?

A. I didn't know until I tried the coke. Of course, an excess of sulphur might be a difficulty.

Q. 50. Didn't you know that difficulty was the very one to be apprehended in coke from the Monongahela coal field?

A. I did not at that time.

71 Q. 51. What knowledge did you have at that time about the quality of coke coming from different localities of the country?

A. I had a knowledge of the Steubenville and Connellsville coke both from working them in a blast furnace.

Q. 52. Did they differ with regard to sulphur?

A. Very little, if any.

Q. 53. Did they differ in any other respect?

A. They did. The Connellsville coke was more dense and solid than the Steubenville; the Steubenville contained more ash impurities than the Connellsville.

Q. 54. Did you then know that the locality from which coke came would afford any means of judging as to the probability of its containing sulphur?

A. No; I believe not.

Q. 55. How long was it after you began to use the Fairmont coke that you first noticed that the fumes from the slag were unusually strong of sulphur?

A. We could notice a change in that direction from the first time we used it.

Q. 56. Was that change brought to the notice of either Mr. William or Mr. Frank Hearne?

A. I supposed they noticed it at the furnace, but I don't know that it was brought to their notice by me.

Q. 57. Did you ever mention it to them?

A. I don't remember.

Q. 58. Under whose directions did you manage the furnace?

A. Under the direction of Mr. Frank Hearne and William L. Hearne.

Q. 59. Do furnaces ever work badly when you can't tell the cause?

A. They do sometimes, when you can't tell the cause immediately.

Q. 60. Do they ever, when you can't tell the cause without going out of blast?

A. Yes, sir.

Q. 61. If sulphur causes such serious troubles in a furnace, do you know why the Riverside furnace continued to use the Fairmont coke after the presence of sulphur was made known by the change in the fumes or otherwise?

A. The presence of sulphur was made known from the start by the trial lot of it, but not to an extent which we supposed would injure the working of the furnace. As to the trial lot, there was no supposition about it; we knew that it did not injure the furnace.

72 Q. 62. How long could scaffolding and slipping exist in a furnace caused by sulphur without you knowing it?

A. Would find it out right away.

Redirect examination by Mr. RUSSELL:

Q. 1. In your cross-examination you say that the time when you began to use Fairmont coke was October or November; on what was your recollection as to the time based?

A. It was based on me coming there on the 15th day of September, taking charge of the furnace, and it was shortly after I came that they commenced receiving Fairmont coke.

Q. 2. Do you remember how long it was after you came?

A. My recollection is that it was a month, more or less.

Q. 3. In your cross-examination you say that after beginning to use Fairmont coke in the blast which began in June, 1873, you stopped using it for a certain purpose; what was that purpose?

A. We wanted to make some pig metal to be used in bar-mill, to make what we call neutral iron, and could not succeed while we were using Fairmont coke.

Q.—. How did you succeed after you quitusing Fairmont coke at that time?

A. The metal was reported good.

Objected to on grounds of being hearsay.

Q. 5. What was your own judgment as to the iron then produced?

A. My own judgment was that the iron was good, but that is a thing that is impossible to tell at the furnace or until it is tried at the mill.

Q. 6. In your cross-examination you say that when Dewey, Vance & Co. sold iron to other parties they delivered it at the furnace; what do you mean by that?

A. I mean that they loaded it on cars at the furnace to be shipped to the parties they sold it to.

Q. 7. State whether that was the invariable rule or not.

A. Could not tell what they did with their iron after it was sent to Wheeling.

Q. 8. How did the Fairmont coke compare in quality of density with Connellsville and with Steubenville coke?

A. It was more dense than either Connellsville or Steubenville coke.

Q. 9. Is density a desirable or undesirable quality in coke, and why?

73 A. It is desirable to a certain extent, because it will keep the furnace open and allow the blast to penetrate the stock equally, and will also come nearer to the zone of fusion without being consumed or crushed.

Q. 10. To what extent, if at all, is sulphur an ingredient in coke?

A. It is not a necessary ingredient, as I understand it.

Q. 11. Is it generally an ingredient?

A. It is.

Q. 12. What effect, if any, does its presence in the coke have on the iron produced?

A. A small portion of sulphur is supposed to make iron "red short," or the relative proportion of sulphur and phosphorus rather, but an excess of sulphur is injurious to iron.

Q. 13. You say in your cross-examination that you did not know in 1872 that the locality from which coke came afforded a means of judging as to the probability of its containing sulphur; what is your present knowledge with regard to that, and how was that knowledge obtained?

A. My present knowledge is that there are localities from which coke come that contain more sulphur than others; it was obtained

partly by my having used coke from different localities, partly from the reports of others.

Q. 14. You say in your cross-examination that you could detect scaffolds and slippings in the furnace as soon as they would occur; how would you detect them?

A. Detect them by the furnace getting cold at the bottom, and by large lumps which will often slip into the bottom of the furnace, preventing the free passage of the blast; also preventing the free flow of the cinder towards the notch, causing cinder to flow back in the blow pipes when the blast is taken off.

Recross-examination by Mr. HUBBARD:

Q. 1. What sort of iron had you been trying to make just before you tried to make the neutral iron for the bar-mill?

A. Red short iron for nails.

Q. 2. Where had you been employed as founder before you went to the Riverside as such?

A. I had been employed by the Mingo Iron Works at Mingo, Ohio. Before that I was five years at the Eliza furnace, employed as carpenter, and was posted during all that time in the burdening and working that furnace.

74 Q. 3. Have you any practical knowledge of the manufacture of coke?

A. I have.

Q. 4. Is it easy to manufacture coke of a uniform quality for any considerable space of time?

A. It is if the coal is properly selected and the ovens kept in proper repair.

Q. 5. What was the quality of the trial lot of Fairmont coke as ascertained by your test?

A. We were satisfied that we could use one-third of it from the test.

Q. 6. Why not all?

A. I don't know that they ever thought of using all; the question never came up.

Q. 7. Did your test show that you couldn't use all Fairmont coke instead of one-third?

A. Our test showed the coke to have a little more sulphur in it than the Connellsville, but we couldn't have told whether we could have used more than one-third without a trial in the furnace.

Q. 8. Why didn't you make that trial?

A. I was never ordered to do so.

Q. 9. How did the trial lot of Fairmont coke compare with the Connellsville coke?

A. It didn't effect the working of the furnace by using one-third of it.

Q. 10. Can you state the comparative values per bushel of the Connellsville coke and the trial lot of Fairmont coke?

A. The trial lot of Fairmont coke, as we used it, was as valuable—equal to the Connellsville.

Q. 11. Can you state the comparative market value of the two, without reference to the proportions as you used them?

A. I cannot.

Q. 12. Or their comparative value, in your judgment, without reference to their market value?

A. No, sir; I can't.

Redirect by Mr. RUSSELL:

Q. 1. Where are you now employed?

A. By the Wheeling Iron and Nail Company at the Top Mill furnace.

And further this deponent saith not.

JAS. H. McCUNE.

75 Adjourned to June 14th, and proceeded on that day with FRANK J. HEARNE.

Examined by H. M. RUSSELL:

Q. 14. How did the poor quality of the Fairmont coke cause a diminution of the quantity of the iron produced during the time of its use?

A. By reason of a disturbance of the regular descent of the stock in the furnace and the cooling of the hearth. The normal working condition of a furnace and the best results as to quality and quantity are secured when the stock is regularly charged and the sides of the furnace are smooth, enabling the descent of the stock to be of uniform speed, thus carrying the same amount of fuel to the hearth in a given time, and producing a regular high temperature at the zone of separation. When the stock from any reason attaches itself to the sides of the furnace and interrupts the regular descent of the charges it results in hanging and slipping of the stock and a variable temperature at the zone of separation, resulting in a diminished quantity of iron produced and of variable quality. A lowering of the temperature is equivalent to an increase in the time required for the separation of the iron from a given amount of stock, hence a smaller production of iron in a given time.

Q. 15. How did the poor quality of the Fairmont coke affect the quality of the iron produced during the time it was used?

A. By an interruption of the normal working condition of the furnace and the presence of an excess of sulphur in the iron produced. A very large portion of the iron being white and mottled, a small portion of the iron was gray, but all contained an excess of sulphur sufficient to make it rotten red short.

Q. 16. Is there any circumstance which fixes in your mind, approximately, the date when you began to use the trial lot of Fairmont coke? If so, state what it is.

A. We employed Mr. James H. McCune as founder on the 15th of September, '72. I remember at that time of calling his attention to some Fairmont coke which we were receiving for purpose of making a trial, and stating to him that within a few days we would be

prepared to charge it in the furnace, which, I think, was done about two weeks after the above date. Thirty of the thirty-four car-loads constituting the trial lot were received at the furnace during the month of September.

Q. 17. In what manner was the excess of sulphur in the Fairmont coke which was received after the trial lot detected by you?

76 A. By the excessive fumes of sulphur given from the furnace at casting and flushing times; in fact it was so noticeable that I remember remarking to some of the furnace men that we ought to start a match factory. We also observed a deterioration of the quality of the iron. Those were the first indications which led to a more careful inspection of the coke, which showed the presence of the discolorations on exposure to the weather characteristic of sulphur; also the presence of an increased amount of slate and iron pyrites or bisulphide of iron.

Q. 18. How long before suspending the use of the Fairmont coke was this inspection made which disclosed the appearances you have mentioned?

A. We did not immediately suspend the consumption of the Fairmont coke, but reduced the percentage at once and continued reducing until it was removed entirely from our mixture; I think early in December.

Q. 19. What defects, if any, can ordinarily be discovered in coke from its appearance?

A. Its want of density, too great porosity, presence of slate, iron pyrites, and the discolorations due to the presence of mechanically combined sulphur.

Q. 20. What do you mean by mechanically combined sulphur?

A. Sulphur occurs in coal and coke in two forms—mechanically and chemically combined. The chemically combined sulphur is largely volatilized and driven off during the coking process. The mechanically combined sulphur is usually combined with slate and pyrites and mostly remains with the coke.

Q. 21. What can be seen upon inspection, if anything, of the chemically combined sulphur?

A. Nothing.

Q. 22. What effect, if any, has the presence in the coke of chemically combined sulphur upon the working of the blast furnace and upon the iron produced therefrom?

A. Usually no serious effect, the chemically combined sulphur being nearly all volatilized near the top of the furnace and escapes in a gaseous form.

Q. 23. What effect, if any, has the presence *of* the coke of mechanically combined sulphur upon the working of the blast furnace and upon the iron produced therefrom?

A. The sulphur, with the slate and pyrites, descends to the lower part of the furnace and there makes its escape, combined

77 with the slag and iron, some of it being volatilized near the bottom, and that is what caused the excessive fumes already mentioned.

Q. 24. What was the appearance of the trial lot of thirty-four carloads and which of the defects which you have mentioned, if any, appeared in it upon inspection?

A. No defects presented themselves upon inspection. On the contrary, the appearance was very good indeed, fully equal to the best standard qualities of coke.

Q. 25. How did that lot compare with Connellsville coke in those qualities which appeared upon the inspection thereof?

A. Fully equal to the Connellsville.

Q. 26. What was the appearance of the Fairmont coke which you received after the trial lot and what defects, if any, appeared in it upon the inspection thereof prior to the time when you made the inspection which led to the decrease and suspension of the consumption thereof?

A. Having no reason to suspect the quality of the coke, I do not remember of making any special inspection until prompted by the working condition of the furnace and the deterioration of the iron.

Q. 27. How did you discover the inferior quality of the iron produced when such inferiority was not indicated by its being white or mottled?

A. By converting it into wrought iron in our forge and testing it thoroughly in our blacksmith shop by hammering, punching, and bending while hot, and by nicking, bending, and breaking while cold.

Q. 28. When and how often were such tests made?

A. It has been our invariable custom to daily test the iron made by our blast furnace in the manner stated above.

Q. 29. For how long has such been your custom?

A. Since February, 1872.

Q. 30. What effect, if any, had the poor quality of the Fairmont coke used by you after the trial lot upon the cost of the iron produced and why?

A. The expenditure of labor and all fixed expenses were the same in the aggregate for the diminished production as though the furnace was working with full capacity; hence the cost per ton was greater. By reason of the irregularity of the descent of the charges black cinder was formed and considerable iron carried off in
78 the slag in the form of sulphuret of iron, involving a waste of material charged in the furnace varying from three to ten per cent. of all charged.

Q. 31. What kind of coke did you use in your furnace prior to the time when you began to use Fairmont coke, and what kind have you used since you quit using Fairmont coke?

A. Connellsville coke.

Q. 32. What is Connellsville coke?

A. It is the coke manufactured in southwest Pennsylvania from the Pittsburgh coal seam, and the name Connellsville is applied to it by reason of the location of the coke ovens in the vicinity of the town of Connellsville. This industry is confined to one basin of coal about fifteen miles long, and varying from two to five miles in

width, where there are located nearly four thousand coke ovens. This locality is known as the Connellsville basin.

Q. 33. How did the quality of the Connellsville coke used by you in your furnace during the time that you were using the Fairmont coke, both the trial lot and that thereafter received, compare with the Connellsville coke used by you before and since that time?

A. It was the same quality; the quality has always been uniformly good during our seven years of consumption of it.

Q. 34. When you reduced the quantity of Fairmont coke and finally discontinued its use what coke, if any, did you replace it by?

A. Connellsville coke.

Q. 35. What was the cost to your firm of Fairmont coke during the time you used it at the ovens at Fairmont, and what at your furnace?

A. We paid six cents per bushel, of forty-one pounds, free on board of the cars at Fairmont. The freight from Fairmont to our furnace was twenty dollars per car-load, of six hundred bushels, or the cost of coke six cents; transportation, three and one-third cents; total, nine and one-third cents per bushel, of forty-one pounds, delivered at our furnace.

Q. 36. What was the market price of Connellsville coke at the ovens and at your furnace during the period between September 1st, 1872, and July 1st, 1873?

A. Five cents per bushel, of forty pounds, on board the cars at the ovens; transportation, forty dollars per car-load, of six hundred bushels, or six and two-third cents per bushel; total cost, delivered at our furnace, eleven and two-third cents per bushel, of forty pounds.

79 Q. 37. What other coke other than Connellsville, if any, could you have substituted for the Fairmont coke; and, if any, what would have been its market price?

A. Steubenville and Rush Run cokes at a cost little less than Fairmont coke. The supply of that coke was limited, though the quality, while not quite as good as the Connellsville coke, yet it has been largely used for several years for iron smelting.

Q. 38. Why did you not get that coke as a substitute for the Fairmont coke instead of getting Connellsville coke at a higher price?

A. Because the product of the coke ovens at Rush Run and Steubenville had been contracted by the neighboring blast furnaces.

Q. 39. Was there any other coke, if any, what, which you could have obtained as a substitute for the Fairmont at a less cost than the Connellsville?

A. None that we were aware of.

Q. 40. After discovering the defects in Fairmont coke used by you after the trial lot what reason did you have, if any, for continuing the use of it during the current blast and for resuming the use of it in the blast that began in June, '73?

A. First, on account of the repeated solicitations of the West Fairmont Gas Coal Company to have us do so; second, on account of repeated assurances from them of an improvement in the quality of

the coke; third, our desire to reduce the cost of fuel to produce a ton of iron.

Q. 41. How much Fairmont coke did you use in the blast which ended in March, '73, and how much in the blast which began in June, '73?

A. The actual consumption I do not remember, though it differed but little from the amount received during each period. Our receipts were approximately as follows: Trial lot, twenty-one thousand bushels, or about 34 car-loads, and from October 4th, 1872, to the end of the blast in March, '73, one hundred and fifty-four car-loads, or equal to about 95,000 bushels of coke. On the blast commencing in June, '73, to the first of December following, eighty-eight car-loads, equal to about 55,000 bushels.

Q. 42. If the Fairmont coke which you received after the trial lot had been equal to the trial lot or of good merchantable quality what change, if any, would you have made in the use of it?

A. We would have used all of the coke embraced in our agreement, and perhaps more, could it have been supplied.

80 Q. 43. In what proportions and at what time would you have done so?

A. We would have used from one-third to one-half and probably consumed all the coke contemplated in the agreement by the first of July, '73.

Q. 44. What was done by you with the iron produced while you were using such of the Fairmont coke as was delivered after the trial lot?

A. Nearly, if not all, was used in our own mill; any of it which was sold was made of but a very small percentage of Fairmont coke.

Q. 45. What difficulties, if any, did you have with regard to any of it which you sold?

A. During the late fall or early winter of 1872 we made sale of 500 tons of pig iron and delivered about 150 tons of it; this was all condemned and we were compelled to transport it to our own mill and there work it up.

Q. 46. What kind of iron was this 150 tons that you have referred to?

A. It was gray forge.

Q. 47. What was the matter with it?

A. It was weak.

Q. 48. To what extent, if at all, was your firm injured by your failure to get the amount of Fairmont coke contracted for and of the quality expected and by the use of such portions of the Fairmont coke as were received by you after the sample lot?

A. At least twenty thousand dollars.

Q. 49. Please give the items of this damage so far as you can do so.

A. First, failure on the part of the West Fairmont Gas Coal Company to deliver 436 car-loads, of 620 bushels each, of good coke, at nine and one-third cents per bushel, for which we had to substitute an equal amount of Connellsville coke, costing us eleven and two

thirds cents per bushel, difference being two and one-third cents per bushel on 270,320 bushels, equal to $6,307.47; second, for deterioration in quality of pig iron made, in which 140,400 bushels of coke were used in the mixture at an average rate, say, of one-third, or thirty bushels per ton, would be 4,680 tons; about 1,500 tons of this were gray, but weak and rotten red short, and was depreciated to the extent of two dollars per ton; the remaining 3,180, being white and mottled, as well as weak and rotten red short, was depreciated
81 to the extent of four dollars per ton, or total for the depreciation of quality of pig iron, $15,720; third, assuming a waste of stock equal to five per cent. passing off with the slag by reason of inferior coke, forming sulphuret of iron, the cost of said stock for a ton of iron being about, say, thirty dollars, would be $1.50 per ton waste on about 3,000 tons of white and mottled iron, equal to $4,500. Relative to the second item, we have no means of determining the exact amount of coke used in proportion of one-third, or how much iron was made therefrom; though we are positive that all coke after the first twelve or fifteen cars immediately following the trial lot was all inferior to the said trial lot and damaged us to whatever extent it was used in our mixture, and while we did not use it in the proportion of one-third, we assume that our damage was upon the amount stated above. The use of the Fairmont coke was limited until it entered as a varying element in the manufacture of much more iron than stated, but not all damaged to the extent claimed in the reduced amount; in other words, the damage was made upon a basis of two dollars damage on one ton rather than one dollar damage on two tons. Relative to the third item, the thirty dollars is assumed to represent the cost of all the stock required for a ton of pig iron, as well as the labor and fixed expense. It is clear that a waste of stock reduces the daily output of the furnace and hence wastes the labor and fixed expense to the same extent as the stock is wasted.

(Foregoing testimony as to damages is objected to because the same is not responsive to any issue made in this cause and not directed to any matters embraced in the allegations of the bill.)

Q. 50. How much coke was required at that time for the making of a ton of pig iron?

A. About ninety bushels.

Q. 51. What was the market price of iron in '72 and '73?

A. To the best of my recollection, iron advanced from January, '72, until the fall or winter of 1872 from forty to fifty-five dollars per ton, and declined to about forty dollars during the following year.

Q. 52. What was the cost of Connellsville coke at the ovens and delivered at your furnace from July, 1873, on?

A. From July, 1873, to October, 1873, four and a half cents per bushel at the ovens; six and two-thirds cents per bushel freight; total, eleven and one-sixth cents per bushel delivered at our
82 furnace. During the month of October, 1873, the price paid by us at the ovens was four and three-eighths cents per bushel; transportation, six and two-thirds cents per bushel; total, eleven and

one twenty-fourth cents per bushel delivered at our furnace. From November, 1873, until, I think, the end of 1874, the price was three and three-fourths cents at the ovens and six and two-thirds cents transportation; total, ten and five-twelfths cents per bushel delivered at our furnace.

Q. 53. What interviews, if any, did you have with any of the officers of the West Fairmont Gas Coal Company with reference to their coke; when and what took place?

A. I do not remember any interviews particularly, with one exception. I saw Mr. Van Alen several times at our office, but do not remember that I personally had any special conversation with him concerning coke. Other members of our firm at that time were transacting that class of business. The exception noted above was in December, 1875, I think; it occurred in our office. During this interview Mr. Van Alen demanded an order for resumption of shipments of coke, based, as he alleged, upon our agreement of October, 1872. This we delined to give. I have not seen Mr. Van Alen since. I never had any other interview that I remember with any of the other officers of said company concerning coke.

Adjourned to June 7th, 1879, and proceeded on that day with testimony of FRANK J. HEARNE.

Explanation by Mr. Frank J. Hearne.

"I think I stated that the range of pig iron in 1873 was from fifty dollars down to forty. Upon examination I find that the range was from forty-three dollars down to twenty-six dollars during that year for gray forge pig iron."

Cross-examination of Mr. F. J. HEARNE by W. P. HUBBARD, Esq.:

Q. 1. At the time of the receipt of the trial lot of Fairmont coke what contracts for coke did your firm have?

A. We had a contract with Hogsett, Watt & Co. for all the Connellsville coke that we might desire for our furnace consumption, but no agreement to use Connellsville coke exclusively, it being understood that we were at liberty to purchase other coke than Connellsville without violation of that contract.

Q. 2. Was that contract verbal or written?

A. It was written.

Q. 3. Is it or a copy in your possession?

A. I presume we have it at our office.

83 Q. 4 Will you produce and file it?

A. We will, if it can be found, and will make an effort to find it.

Q. 5. How rapidly did you increase the percentage of Fairmont coke while you were using the trial lot?

A. After charging a given percentage of it in our mixture sufficient time was allowed to elapse for that mixture to pass through the furnace and a practical test made of the iron before an increase of the percentage of Fairmont coke used was made.

Q. 6. What time was actually given to this test on each charge?

A. About three days on each change, as near as I can remember.

Q. 7. How much Fairmont coke was introduced into the first charge of which you made this test?

A. It was either one-quarter or one-fifth, but I think one-fifth.

Q. 8. What was the absolute quantity of Fairmont coke in that charge?

A. The method of charging our blast furnace with coke is by barrowfuls supposed to be of uniform weight, and the percentages of Fairmont coke were varied by charging every sixth, or fifth, or fourth, or third, or second barrow of that material, as we might desire. These barrows contained six hundred pounds each.

Q. 9. How many barrowfuls of coke of all kinds went into the first test charge?

A. I do not remember.

Q. 10. Can you approximate?

A. No, sir.

Q. 11. Can you state exactly or approximately the whole amount of coke in an ordinary charge in your furnace?

A. Twelve hundred pounds of coke is called a charge—or two barrowfuls.

Q. 12. Did the first test of Fairmont coke occupy about three days?

A. I think it did—from two and a half to three days.

Q. 13. Have you any means of ascertaining the amount of Fairmont coke used in that test?

A. The furnace was producing, as near as I can remember, at that time about fifty tons of iron daily—say from fifty to sixty—
84 with a consumption of about ninety bushels of all kinds of coke per ton of iron; in the neighborhood of about twenty-five hundred bushels of Fairmont coke on each change.

Q. 14. That estimate of the amount of Fairmont coke is made, is it not, for three days, and on the supposition that Fairmont coke constituted one-fifth of the whole coke?

A. Yes; with the additional assumption that the time occupied in that change might have been a little less than three days.

Q. 15. Was the proportion of Fairmont coke changed when you made the second change of three days, or nearly so during that test?

A. I think it was; it was, I think, increased to one-fourth.

Q. 16. When was the next increase made in the proportion of Fairmont coke?

A. After the lapse of about the same length of time that was occupied in the first change.

Q. 17. What increase was then made?

A. The proportion of Fairmont was then increased to one-third.

Q. 18. Was any further change in the proportion made; if so, what and when was it made?

A. I think that after the lapse of about the same time occupied in the other changes the proportion was increased to one-half.

Q. 19. How long did you continue to use that proportion?

A. I think about the same length of time as the others.

Q. 20. What change was then made?

A. I think the percentage was reduced to one-third, with the intention of continuing the consumption indefinitely at that rate.

Q. 21. Why was that reduction made?

A. Because our agreement for supply of Fairmont coke was three cars daily, or equivalent to about one-third of our daily consumption.

Q. 22. Had your agreement been made at that time?

A. I think it had.

Q. 23. Had you at that time used the twenty-one thousand bushels of coke embraced in the thirty-four car-loads of the trial lot?

A. I think that it had, but would not state positively, as from the best of my recollection there was no intermission in the shipments of the thirty-four car loads and upon entering upon the per-
85 formance of the contract; from the best of my recollection our agreement with Mr. Van Alen was made while the last day's shipments of the trial lot was in transit.

Q. 24. If you cannot say positively that the contract had been made at the time of the reduction, can you say positively that that reduction was made because your agreement for Fairmont coke was three cars daily?

A. All the preliminaries and trial lot, before concluding the agreement, were based upon the ability of the West Fairmont Gas Coal Company to supply its three cars daily, should the trial lot prove satisfactory.

Q. 25. Have you any further answer to make to the preceding question?

A. I have no further answer to make.

Q. 26. What do you mean by the preliminaries?

A. The results of interviews between Mr. Van Alen and other members of our firm, and reported to me.

Q. 27. Was the increase from one-third to one-half in the use of Fairmont coke made before or after your agreement for three cars daily?

A. I presume it was made before the agreement.

Q. 28. Then, is it your recollection that that agreement was made while you were using Fairmont coke in the proportion of one-half?

A. My recollection, the agreement was made after reducing the proportion to one-third, or about the time of the reduction.

Q. 29. Then could that agreement have been the cause of the reduction?

A. I think the exhaustion of our supply of coke might have been the immediate cause of reduction, together with the additional reason that after having tested satisfactorily to the extent of one-half we felt entirely secure in entering upon a consumption one-third indefinitely.

Q. 30. Last question repeated.

A. No, sir.

Q. 31. Why, then, when asked "why that reduction was made" did you answer, "Because our agreement for supply of Fairmont coke was three cars daily, or equivalent to about one-third of our daily consumption?"

A. The answer is correct; we supposed that we could not secure a larger supply than one-third.

Q. 32. Did your supposition constitute an agreement?

A. I presume not.

86 Q. 33. If you tested satisfactorily to the extent of one-half, why did you not feel secured in continuing to use in that proportion?

(Objected to because witness has not said that they did not feel secured in so continuing.)

A. I know of no reason why we should not have felt secure to continue at the rate of one-half had the supply of coke been adequate.

Q. 34. Was there any exhaustion of your supply of coke if the shipments continued without intermission?

A. I think not.

Q. 35. Then could the exhaustion of your supply of coke have been the immediate cause of reduction?

A. The anticipated exhaustion could have been.

Q. 36. Why then did you say "I think the exhaustion of our supply of coke might have been the immediate cause of reduction?"

A. I meant the anticipated exhaustion, assuming that receipts of three cars daily would not keep up a stock rate consumption at the rate of four and one-half cars daily.

Q. 37. Was that the reason you anticipated an exhaustion of coke?

A. Yes.

Q. 38. How long after you began to use the trial lot of Fairmont coke was it that you made the agreement?

A. I think it was about one or two weeks.

Q. 39. How soon after Mr. McCune came to the furnace did you use the first of the trial lot of Fairmont coke?

A. Only a few days; probably one or two weeks.

Q. 40. Was your agreement with Mr. Van Allen verbal or written?

A. I was not a party to the agreement; took no part in making.

Q. 41. Is your knowledge, then, respecting it derived wholly from others?

A. I think it was at that time.

Objection by Mr. Hubbard: All the testimony of this witness respecting the making of this contract and its effect objected to as being hearsay.

Q. 42. Look at the letter we handed you, dated October 7th, 1872, and marked Exhibit "Z," and state who wrote it, if you know.

86½ EXHIBIT "Z."

WHEELING, W. VA., *October* 7, 1872.

Mr. G. R. Van Alen, president the West Fairmont Gas Coal Co., Fairmont, West Va.

DEAR SIR: Yours of the 5th inst. is received. We will not until to-morrow be able to give you an account of coke shipped by you during September, as the returns of last week's receipts at furnace will not be sent up before then.

We beg to ratify our verbal agreement of October 4th, by which you are to deliver us until July, in 1873, an average of three cars of coke per day, at six (6) cents per bushel of 41 pounds, we to settle for same by our note of 90 days from the 1st of each month for the previous month's delivery.

We enclose our note for September deliveries for $1,119.70, the receipt of which please acknowledge. The differences, if any, can be adjusted in next settlement.

Yours truly, DEWEY, VANCE & CO.

A. Col. N. Wilkinson, a member of the firm of Dewey, Vance & Co. at that time.

Q. 43. What were his duties as a member of that firm at that time?

A. He was secretary.

Q. 44. When you began the test of Fairmont coke what were your expectations with regard to the amount of sulphur to be found therein?

A. I had no impressions concerning the Fairmont coke.

Q. 45. Did not the locality from which it came suggest the probability of its containing sulphur to a greater extent than Connellsville coke?

A. It did not. I did not have any knowledge of Fairmont coal or coke at that time.

Q. 46. Did you then know that coke coming from different places is apt to differ with regard to the amount of sulphur it contains?

A. Yes.

Q. 47. Wasn't the principal purpose for which you made the test to ascertain whether the amount of sulphur contained in the coke was so great as to prevent its successful use?

A. No.

Q. 48. What were the difficulties possibly to be apprehended and with reference to which you made the test?

87 A. We had no knowledge of the qualities of the coke, and made the trial to determine if there were any grounds for probable apprehension.

Q. 49. What grounds of apprehension did you suppose might exist?

A. We had no supposition in the matter at all.

Q. 50. How did the Fairmont coke compare with Connellsville coke as ascertained by the test of the trial lot of Fairmont coke?

A. Compared favorably.

Q. 51. Do you mean that the test disclosed it to be as valuable as Connellsville coke?

A. What do you mean by "valuable as Connellsville coke," in the market or for iron making?

Mr. HUBBARD. You may answer as to both.

WITNESS. The market price as determined by our agreement was considerably less than Connellsville coke. The value, as determined from the result of our trial, was that it was equally valuable to us with the Connellsville coke.

Q. 52. Couldn't you use Connellsville coke alone?

A. Yes.

Q. 53. Could you use Fairmont coke alone?

A. I don't know.

Q. 54. How, then, can you say that the latter was as valuable to you as the former?

A. Because we derived from it equal value.

Q. 55. What were the comparative values of Connellsville and Fairmont coke as determined by your test, without reference to your agreement as to price, if the two were exposed to sale in an open market?

A. I don't know.

Q. 56. If offered at the same price, which would you have bought?

A. Connellsville.

Q. 57. Would you have been willing to make any difference in price in favor of the Connellsville coke?

A. I don't know.

Q. 58. Did not the test you made satisfy you that the Fairmont coke was of an inferior quality to the Connellsville coke?

A. In some respects it was; in others it was not, but was superior.

Q. 59. Taken altogether was it inferior or superior to the Connellsville coke?

88 A. For the purpose of its use, and in the manner used by us, taken all in all, it was not inferior to the Connellsville coke?

Q. 60. Without reference to any particular purpose, was it not inferior to the Connellsville coke?

A. I do not know.

Q. 61. Did you not pronounce it to be coke of an inferior quality to Connellsville coke after making the test you have spoken of, and as the result of that test?

A. I don't remember that I did.

Q. 62. Was not that assigned as a reason for making the price lower than the Connellsville coke?

A. I had no part in making the price.

Q. 63. Didn't you give your partners your opinion as to the limit of the price you ought to pay?

A. I don't remember that I did.

Q. 64. On whose opinion did they rely in making the agreement?

A. I presume upon my father's opinion.

Q. 65. Did you give any opinion to your father with reference to the matter?

A. I do not remember as to any with respect to price.

Q. 66. Under whose superintendence was this test made?

A. Probably under my superintendence as much as any one.

Q. 67. How did it come that you superintended the test and didn't make known the result of it to those for whose guidance in making an agreement the test was made?

Objected to because the witness has not stated that he did not make known the result of his test, but only that he did not give an an opinion as to price.

WITNESS. A. Is it shown that I made no report?

Q. 68. Well, did you make any report?

A. I did.

Q. 69. What was it?

A. It was to quality.

Q. 70. What did you report as to quality?

A. Report was favorable.

Q. 71. Can't you state more definitely what your report was?

A. No, sir.

Q. 72. Did you in that report compare it with Connellsville coke?

A. I don't remember.

Q. 73. Do you remember anything about that report, except that it was favorable?

89 A. Nothing.

Q. 74. To whom did you make it?

A. To various members of the firm; perhaps more particularly to father; the other members of the firm referred to are Mr. Vance, Mr. Culbertson, and Col. Wilkinson.

(After dinner witness made the following statement:)

Witness stated this morning that our contract with Hogsett, Watt & Co. was entered upon July 1, 1872. I find, upon examination, that the date should have been July 1, 1873. Our Connellsville coke supply from July 1, '72, to July 1, '73, was procured from Messrs. Brown & Blaine under contract of above same tenor as stated this morning, and the contract of —, herewith presented for consideration. (Two contracts were here presented by witness and were marked Exhibit "Y" and "X," respectively, and filed. Exhibit "Y" is the agreement with Hogsett, Watt & Co. and Exhibit "X" the agreement with Brown & Blaine. L. T. Stifel, notary public.)

EXHIBIT "Y."

Article of agreement, made this 18th day of June, one thousand eight hundred and seventy-three, by and between Hogsett, Watt & Co., of Fayette county, Pennsylvania, of the first part, and Dewey, Vance & Co., of Wheeling, West Virginia, of the second part, witnesseth:

That the party of the first part agreed to furnish the party of the second part, at the works of the party of the first part, eight (8) car-

loads of coke daily, more or less, as the party of the second part may require for consumption at their Riverside furnace during one year, commencing July 1, one thousand eight hundred and seventy-three, and ending July first, one thousand eight hundred and seventy-four.

The coke to be of the best quality, well made, and not washed out with coal-bank water. The average quantity in each car to be twenty-four thousand (24,000) pounds, the party of the first part agreeing to make good to the party of the second part any and all loss they may sustain in cost of freight by the shortage of the weight of coke.

The party of the first part are not to be accountable for shortage of transportation, but agree to use all due diligence in procuring the above-named eight cars daily.

The party of the second part agree not to purchase Connellsville coke from any other party than the party of the first part, unless the party of the first part cannot fully supply the same, and in such an event the party of the second part agree to purchase only so much coke of other parties as will keep up their stock.

The party of the second part agree to pay the party of the first part four and one-half (4½) cents for each and every bushel of forty pounds received at Riverside furnace, settlements to be made on the tenth of each month for all shipments of the preceding month that have arrived at the furnace up to that date by the note of the party of the second part at sixty (60) days. It is further agreed that should the party of the first part fail to furnish the said nine cars daily by reason of neglect or want of effort on their part, then the party of the second part shall be at liberty to purchase the deficiency of other parties, and the party of the first part agree to pay the party of the second part any excess in cost of said purchase over and above four and one-half (4½) cents per bushel:

Provided, however, That nothing in this agreement in case of a strike or the destruction of their works by the elements and during the stopping of their works from any cause over which the party of the first part have no control shall bind them to pay the excess of cost over four and one-half cents per bushel.

It is also agreed that should the current price of coke go below four and one-half cents per bushel the party of the second part shall have the benefit of the lower rate on all coke not shipped at the date of the decline.

In witness whereof we have hereunto set our hands the day and year first above written.

HOGSETT, WATT & CO.
DEWEY, VANCE & CO.

EXHIBIT "X."

An article of agreement, made this first day of July, 1872, by and between Brown & Blain, of Pittsburgh, of the first part, and Dewey, Vance & Co., of Wheeling, of the second part, witnesseth:

That the party of the first part agree to furnish the party of the second part eight (8) cars of Connellsville coke daily, more or less—such an amount as the party of the second part consume in their Riverside furnace during the year from July 1, 1872, to July 1, 1873, upon the following conditions:

The party of the first part are not to be held accountable for shortage of transportation, but bind themselves to furnish daily as nearly as possible to make and maintain a good stock of coke in the house of the party of the second part.

91 The party of the second part must not purchase Connellsville coke from any other party than the party of the first part, so long as the party of the first part fully supply the same; in such an event only so much can be purchased as to secure a stock.

The party of the second part agree to pay the party of the first part five (5) cents per bushel of forty pounds for each and every bushel of coke delivered on board of cars at the mines of the party of the first part.

Settlements in full to be made monthly by the party of the second part giving sixty (60) day notes.

Party of the first part agree to settle by the weight of the party of the second part.

BROWN & BLAIN.
DEWEY, VANCE & CO.

Q. 75. Do you know when and by whom and why the word "nine" was interlined with pencil over the word eight toward the end of the first page of the contract of Hogsett, Watt & Co.?

A. I presume the alterations and interlinings in pencil was done by Col. Wilkinson for the purpose of blocking out a new contract entered into February 1, 1874, and was then handed to a clerk for purpose of preparing a new contract. The word "nine" written in pencil over the word eight is not a part of this contract, but a memorandum for new contract.

Q. 76. At the time the trial lot of coke was sent you what information, if any, had you as to whether the West Fairmont Gas Coal Company had manufactured any coke before that time?

A. A sample of coke was left at our office, and I had understood that they had shipped coke to Zanesville or Columbus, Ohio, or both places. I had no knowledge other than hearsay.

Q. 77. Who made the test of the Fairmont coke at the time you were using the proportion of one-half?

A. It was done under my general direction.

Q. 78. Who had immediate charge of the furnace?

A. Mr. James H. McCune.

Q. 79. Did he give you his opinion as to what proportion of the Fairmont coke you could take and safely and properly use?

A. I do not remember the exact terms in which Mr. McCune expressed himself, though the opinion which I formed was based upon his reports to me and what I saw daily at the furnace.

92 Q. 80. Was any record of that test kept?

A. Not that I am aware of.

Q. 81. Did that test show sulphur to exist in the Fairmont coke to a greater extent than in the Connellsville coke?

A. It may have shown slightly more sulphur than the average Connellsville. Connellsville coke is subject to some variation in sulphur.

Q. 82. Didn't it show so much sulphur as to satisfy you that you could not have used Fairmont coke alone?

A. I am not aware that it did. I never thought about using Fairmont coke alone.

Q. 83. Why not?

A. I did not know where the supply could be procured.

Q. 84. What variation, if any, was there in the price of Connellsville coke between October 4, 1872, and January 1, 1874?

A. Connellsville coke delivered at our furnace was worth eleven and two-thirds cents per bushel from July 1, '72, to July 1, '73; it was worth eleven and one-sixth cents per bushel during the months of July and August, 1873; it was worth eleven and one-twenty-fourth cents per bushel during the months of September and October, 1873; ten and five-twelfth cents per bushel during November, December, and January. The prices above given is what it cost us.

Q. 85. Was there any change in freights on Fairmont coke between the dates mentioned in my previous question?

A. I think there was an overcharge during August, '73, but the West Fairmount Gas Coal Company agreed to pay the difference. We paid no advance in freight during that time. This overcharge was temporary, lasting but a few days. There was no increased cost to us for freight during this time.

Q. 86. What were the lowest figures at which Connellsville coke had been offered before February?

A. I don't remember. I can give you the lowest price we paid for any. The lowest cost to us for Connellsville coke prior to February 1, 1874, was ten and five-twelfth cents per bushel, to the best of my knowledge.

Q. 87. How much of that was for coke and how much for freight?

A. Coke was three and three-quarter cents and the freight six and two-thirds cents.

Q. 88. Look at the letter now shown you, dated January 17, 1874, signed Dewey, Vance & Co., and now filed and marked Exhibit "W," and state, if you know, by whom it was written.

93 EXHIBIT "W."

WHEELING, W. VA., *January* 17, 1874.

G. R. Van Alen, Esq., president, No. 77 & 83 Liberty St., New York.

DEAR SIR: Yours of the 15th inst. is received. We offered a few days since Connellsville coke at 3c. per bus., and have had several offers for a year's supply at but a trifle over that.

In regard to freights, your position at Fairmont leaves you subject to local rates, while the competition now existing between the Balto. & Ohio R. R'd Co. and the Pennsylvania Co. has in a measure reduced freight rates between competing points, both of these roads having full connections into the Connellsville coke regions.

Yours truly, DEWEY, VANCE & CO.

A. That was written by Col. Wilkinson. The best evidence on that, Mr. Hubbard, is the fact that we signed a contract shortly after that at a half cent more than he mentions in that letter; he is evidently mistaken.

Q. 89. Was the fact that your firm was using Fairmont coke ever used by the firm in negotiating contracts for Connellsville?

Objected to by Mr. Russell.

A. Not to my knowledge.

Q. 90. Which of your firm acted in the making of the two contracts you have filed, and the contract made in February, 1874?

A. I am not aware that it was the work of any one member of the firm.

Q. 91. If more than one acted state who they were?

A. Col. Wilkinson, Messrs. Vance, Culbertson, W. L. Hearne, and myself.

Q. 92. Did your firm, after January 1, 1874, endeavor to make a contract for the purchase of more coke from the West Fairmont Gas Coal Company?

A. I think there was some correspondence concerning it.

Q. 93. Do you know why that was done, if previous deliveries had been so unsatisfactory?

A. From the belief that they could and would deliver as good quality of coke as they did for the trial lot.

Q. 94. Had they, after that trial lot, until January 1, 1874, ever delivered to you coke of as good quality as that trial lot?

94 A. None, that I am aware of, with the exception of a few car-loads delivered immediately after the trial lot; I suppose fifteen or twenty car-loads.

Q. 95. Is it true, in view of that fact, that your firm believed that the West Fairmont Gas Coal Company could and would, after January 1, 1874, deliver you coke of a quality equal to the trial lot?

A. Yes. We had understood that the demand for their coke had so far diminished that they would at that time be prepared to manufacture coke for us from clean slack and freshly mined.

Q. 96. You say in your examination-in-chief "that certain indications at the furnace led to a more careful inspection of the coke, which showed the presence of discoloration on exposure to the weather, characteristic of sulphur; also the presence of an increased amount of slate and iron pyrites or bisulphide of iron." In what manner was that inspection made?

A. Simply by observation of the coke.

Q. 97. How long was it after you observed the excessive fumes of sulphur and the deterioration of the iron that you made the more careful inspection of the coke?

A. I suppose immediately upon discovering these things. I desire to state here that upon receipt of the trial lot we gave the coke a careful inspection, and when we speak here of giving the coke a careful inspection we mean a renewal of the watchfulness exercised with the first shipments.

Q. 98. How long could the excessive fumes of sulphur and the deteriorated quality of the iron exist without your discovering them?

A. It would depend upon the degree of the deterioration and the amount of sulphur.

Q. 99. Suppose them to exist just as you found them in this case, how long would it take you to discover them?

A. About two and one-half days from the time the coke is put into the furnace.

Q. 100. You give as a reason for continuing the use of Fairmont coke during the first blast, and resuming use of it in the blast that began in June, '73, first, "the repeated solicitations of the West Fairmont Gas Coal Company to have you do so." In what manner were those solicitations made, and by and to what individuals?

A. By mail and telegraph and personal interviews with mem-
95 bers of our firm, my father and Col. Wilkinson, I think, by Mr. Van Alen and Mr. Davidson, of the West Fairmont Gas Coal Company.

Q. 101. Were you present at those interviews?

A. I have no recollection of them now.

The testimony of the witness objected to so far as it relates to those interviews.

Q. 102. Will you produce and file all the communications by mail and telegraph that you have mentioned?

A. They are not in my custody, but I will if I can.

Q. 103. In whose custody are they?

A. I presume the secretary of our company could answer that question; he is the custodian of all our papers.

Q. 104. You speak in your examination-in-chief of repeated assurances from them, meaning the West Fairmont Gas Coal Company, of an improvement in the quality of the coke. In what manner were those assurances given?

A. By mail, telegraph, and personal interviews.

Q. 105. Were you present at those interviews?

A. I have no recollection of them now.

Last previous objection repeated.

Q. 106. Will you produce and file those communications?

A. I will if I can.

Q. 107. About what time were those assurances given?

A. I do not recall the dates, but I think at intervals between the 1st of November, 1872, and the 1st of November, '73.

Q. 108. Was there any improvement in the quality of the coke?

A. None that we were aware of.

Q. 109. Can you give the exact date of the sale of five hundred tons of pig iron that you mention in your examination-in-chief?

A. From the best of my recollection, the latter part of November or early part of December, '72.

Q. 111. To whom was it sold?

A. To the Wheeling Iron and Nail Works.

Q. 112. Can you give, from your books, the exact date of the sale or delivery of that iron?

A. I think we can, though I am not certain.

Q. 113. Will you do so if possible?

A. I will.

Q. 114. How long had that iron been made before it was delivered to the Wheeling Iron and Nail Works?

96 A. I think it was shipped on the day following the day it was made.

Q. 115. Did you use Fairmont coke in the furnace from January to March, 1873?

A. I think we did; a little.

Q. 116. Can you say to what extent?

A. Our receipts during the three months, January, February, and March, were fifty car-loads, and I suppose our consumption was something less than that. We had coke left in stock after putting the furnace out of blast, the 21st of March.

Q. 117. Had you any Fairmont coke on hand when you discontinued its use in December, '72?

A. I do not remember.

Q. 118. How many car-loads had you received during December, '72?

A. Seventeen.

Q. 119. And November, '72.

A. Twenty-nine.

Q. 120. Did you receive any in January, '73?

A. Five car-loads.

Adjourned to June 21st, 1879, on which day came the parties and William Gaskill, a witness for complainants.

Examination of William Gaskill.

Q. 1. State your age, residence, and occupation.

A. My age, 52; residence, Fairmont; occupation, farming, hauling coal, digging coal, and doing anything coming handy.

Q. 2. Where were you employed and — what capacity in the summer and fall of 1872?

A. I was pit boss of the coal mine, you might call it, at West Fairmont.

Q. 3. In whose employ were you?

A. I was in the employ of the West Fairmont company.

Q. 4. What were your duties as pit boss at that time?

A. To look after the mining of the coal to see that it was done well and to see to the loading.

Q. 5. What were your duties, if any, with reference to the manufacture of coke for that company?

A. Well, sir, it was, I think, the coke was manufactured under my supervision. I overlooked it — any rate.

Q. 6. What kind of coal was used about that time in the manufacture of coke by that company?

A. Well, sir, as good a coal as we had—the slack out of the coal.

97 Q. 7. What do you mean by the slack?

A. Well, slack is what we separate from the coarse coal, either by screening it or raking it on the inside of the mines.

Q. 8. How and why was the slack separated in the mines from the coarse coal?

A. Well, we separated it on the inside of the mines. Well, Fairmont coal has always been cleaned inside of the mines every place where it has been worked.

Q. 9. Why is it so cleaned, and how?

A. Well, the mining of coal makes too much slack for them to ship; consequently they have to throw it back in the mine.

Q. 10. How was the coal screened, and where?

A. The coal was screened by dumping it into the hopper, gondola, house-car, or box-car; there is where we screened it as we dumped sometimes in one thing and sometimes in another.

Q. 11. From what position was it dumped?

A. Well, sir, it was hauled out of the mines, hauled on or pushed to the tipples, the end gate knocked out and the rim kicked off the dump pole, and it went down over the screen onto the car.

Q. 12. What part of the mines did you throw the slack which was separated in the mines?

A. Along side of our roads in each room.

Q. 13. How long did it lie there before being made into coke?

A. It is laying there yet; it never has been made into coke.

Q. 14. What slack was it that was made into coke?

A. Well, sir, the slack that was made into coke was the slack that was mined every day. I don't think it ever went back two days, after a bit; my screens were short and of course it would screen all the slack that was made; I threw it back inside so that I could get it each day as I wanted it.

Q. 15. What do you know, if anything, about the use, about that time, by the West Fairmont Gas Coal Company, of an old slack bank in the manufacture of coke?

The WITNESS: That summer you want?

Mr. RUSSELL: Yes.

A. Didn't use any of it that summer.

Q. 16. Please answer now as to that fall.

A. Yes, sir; I used of that slack pile we had lying between the main track and our switch.

Q. 17. How much of it was so used?

98 A. I didn't—I couldn't answer that question.

Q. 18. Can't you approximate the amount?

A. Well, I don't know; I some days would use ten to twelve tons of it; have used so many as twenty-five.

Q. 19. For how long a time were you using it?

A. Well, sir, I think we commenced somewhere near betwixt the 16th and 20th of October; used it up the balance of the month (October) and they got a new man to burn the coke and I knew nothing more about it; after this, somewhere along about the first of November, he kept account of the slack and I kept an account of the coke that was shipped.

Q. 20. Please describe that old slack bank.

A. Well, there was a low piece of ground there, and the slack had been put in there from the screenings from coal shipped West, I reckon. Well, the piece of ground betwixt our track for loading and the main track is about sixty feet, I reckon; that slack was deposited there because there was no place else to put it.

Q. 20½. How long had it been there?

A. Well, sir, to the best of my recollection it was put in there in the spring of 1872, or winter, or in '71; there might have been some of that coal loaded in '71; it was loaded that spring and winter, and maybe some of it might have been loaded in the fall and fore part of that winter.

Q. 21. What was the situation of that old slack bank with reference to its being wet?

A. Well, after we got down to the level of the tracks it was all of it more or less wet—bound to be wet by laying out.

Q. 22. What was its condition as to mud or dirt?

A. There might have been some dirt in it.

Q. 23. Did you have any conversation with any of the officers of the West Fairmont Gas Coal Company with reference to the use of that slack bank; if so, with whom and what were the conversations?

A. Well, Jackson and me have talked about the slack pile. Well, we concluded there was a little too much dirt in it. I believe I told Mr. Van Alen it wouldn't do to take it any lower than the level of the tracks on account of the mud washing off the hill against the slack pile.

Q. 24. What did Mr. Van Alen say in reply, if anything?

A. Well, he said he didn't think it would make any difference to leave three or four feet on the upper side.

Q. 25. Did he say anything else about it; if so, what?

99 A. Well, he said it wasn't worth while to waste it.

Q. 26. When was that conversation with Mr. Van Alen?

A. Well, it was somewhere along the latter part of October, I think; along there somewhere.

Q. 27. Was it before or after you commenced to use that old slack bank?

A. Well, it was after I commenced using it.

Q. 28. How much of it had been used at the time of that conversation?

A. Well, not more than a fourth of it, I reckon.

Q. 29. In using that old slack bank did you stop at the level of the track or go below that level?

A. I went below it, sir.

Q. 30. Was the conversation you have mentioned with Mr. Van Alen before or after you had got below the level of the tracks?

A. Before.

Q. 31. What was the condition of that old slack bank in rainy weather?

A. Well, it was wet. The water stood again- the upper side of it in a heavy rain.

Q. 32. How much of that old slack bank had been used up before this other man whom you have mentioned took charge of the coke making?

A. Well, I suppose there had been half of it used, probably.

Q. 33. When was it that you and Jackson had the conversation that you have mentioned?

A. Before ever I commenced on the slack pile.

Q. 34. What connection, if any, had Jackson at that time with the West Fairmont Gas Coal Company?

A. Well, sir, he was superintendent of it.

Q. 35. Do you know where any of the coke went to that was made while you were using that old slack bank?

A. Some of it went up to Hardman's and some of it went to the Riverside furnace.

Q. 36. Do you know anything of a layer of sulphurous coal at the bottom of the vein of coal which was being mined at that time by the West Fairmont Gas Coal Company; if so, what do you know?

A. Yes, sir; I know that our coal was dirty at the pavement.

Q. 37. What do you mean by dirty?

A. Sulphur and impurities.

100 Cross-examination by W. P. HUBBARD, Esq.:

Q. 1. What effort did you make to avoid the use of the dirty coal at the pavement in taking slack for the manufacture of coke?

A. Well, sir, I mined it off of the pavement about four inches.

Q. 2. Was the result of that to avoid the use of the dirty coal?

A. Yes, sir.

Q. 3. Doesn't that sulphurous layer of coal extend throughout the mines?

A. Yes, sir; it does.

Q. 4. Has any more slack been put between the main track and the siding since 1st of November, 1872?

A. Yes, sir; there has.

Q. 5. When was it put there?

A. Well, I reckon it was put there in the winter of '75 and '76.

Q. 6. About how much.

A. Well, there may have been 150 or 200 tons put in there about that time.

Q. 7. About how much was there in that pile when you began to manufacture coke from it?

A. Well, sir, I couldn't tell you; it was about from four to six feet above the siding—above the main track.

Q. 8. Can you make any estimate of the number of tons in it?

A. I don't think I can.

Q. 9. Can you give approximately the dimensions of the pile?

A. Well, I would judge it was 100 feet long by 50 wide.

Q. 10. And how deep?

A. Well, from four to six feet.

Q. 11. Can you state the cubic contents of a ton of that slack—that is, how much of that slack in length, breadth, and depth would it take to make a ton?

A. Well, it will take (a cubic yard won't fill one of our cars) about a yard and a foot.

Q. 12. How many feet do you understand there are in a cubic yard?

A. About 2,700—that won't do; that's not correct. Well, now, in another sense, to look at what I mean—four feet square.
101 Well, it will take a cubic yard and a third to fill one of our cars.

Q. 13. How long, how broad, and how deep is one of your cars?

A. Our cars measure about seven feet four inches in length, two feet in width in the bottom, and about three feet in width at the top; depth about thirteen inches; I have measured many a one, but I don't pretend to say that's correct.

Q. 14. What weight of slack will one of those cars hold?

A. Well, sir, as near as we could get at it, our slack will weigh about seventy pounds to the bushel; you can put about thirty-six in a car.

Q. 15. How much coke did you make to the ton of slack?

A. Well, sir, I made about thirty-five to forty bushels from the car-load of slack.

Q. 16. Can you tell how much to the ton?

A. No; I can't.

Q. 17. Did each bushel of slack make about a bushel of coke?

A. Yes, sir; sometimes it would overrun; more coke than slack.

Q. 18. What injury did it do the slack pile to be wet?

A. Don't think it done it any, sir.

Q. 19. State, as nearly as you can, the amount of slack that was used from below the level of the tracks.

A. As I stated before, I put 150 or 200 tons in betwixt the two tracks to level it up.

Q. 20. Did that level it up?

A. Yes, sir.

Q. 21. Doesn't slack that is wet make as good or better coke than if not wet?

A. Well, I don't know as I can just answer that question.

Q. 22. What was your judgment at the time you were using it from between the main track and siding?

A. Well, I considered as long as I didn't get down to the overflow of water that was against the upper side of it, I didn't think but what it would make as good coke as any.

Q. 23. What injury could the overflow of water do the slack?

A. Well, it could wash the mud into it.

Q. 24. How far into it could it wash the mud?

A. Well, sir, I can't tell you.

Q. 25. Did you leave the three or four feet on the upper side, as Mr. Van Alen told you?

102 A. Well, yes, sir; to some extent I did.

Q. 26. Was there any sulphur in the mud that might have washed into the slack pile?

A. No, sir, I think not.

Q. 27. How far up did the overflow of the water come—to the level of the tracks?

A. Yes, sir; at the time of big rains.

Q. 28. What is Mr. Jackson's first name?

A. Oliver, I think.

Q. 29. When did he cease to be superintendent of the company?

A. Well, that fall; last of October.

Q. 30. Was he the superintendent of the company the time you had the conversation with Mr. Van Alen, that you have mentioned?

A. Well, he was getting pay, but he wasn't about the works but very little at that time.

Q. 31. How was it at the time you had the conversation with Mr. Jackson?

A. Well, he was in the employ of the company.

Q. 32. Was he about the works much?

A. I might see him once in a couple of weeks.

Q. 33. What time was the conversation between you and him?

A. Before I commenced on the slack pile.

Q. 34. What time of the year was it?

A. Last of September or first of October.

Q. 35. Why did you commence on the slack pile?

A. By Mr. Van Alen's orders.

Q. 36. Did you have a conversation with him before you commenced?

A. He had told me to use it up.

Q. 37. Was that in the same conversation that you have mentioned before?

A. I think not, sir.

Q. 38. Did you have a conversation with Mr. Van Alen before you commenced to use that slack pile?

A. Yes, sir; I had had a conversation with Mr. Van Alen.

Q. 39. When and where?

A. There at the mines; I don't know just what time; he said to me, says he, "Bill, can't you burn that slack pile?" I said I thought I could, all the clean part of it as far as it wasn't overflowed; I think that is about what I said.

103 Q. 40. Did you have more than these two conversations with Mr. Van Alen?

A. I don't recollect of having any more.

Q. 41. Were they both at the mines?

A. Yes, sir; they were.

Redirect by Mr. RUSSELL:

Q. 1. Where did the water come from that overflowed into this old slack pile?

A. Well, it came off the hill side above it.

Q. 2. What was the condition of the water when it reached the slack pile?

A. At the time of a big rain, very muddy.

And further this deponent saith not.

WILLIAM GASKILL.

Deposition of Thornton L. Boggess.

At the same time and place came THORNTON L. BOGGESS, another witness on behalf of the complainants, who, being first duly sworn, deposeth and saith:

Examined by Mr. RUSSELL:

Q. 1. State your age, residence, and occupation.

A. I am forty years old; live in Fairmont; am farming now.

Q. 2. Where were you and how engaged in the summer and fall of 1872?

A. I was engaged at taking care of the stable and mules at the coal mines of the West Fairmont Gas Coal Company and tending to the track, too.

Q. 3. What do you know, if anything, of the use by that company, during the summer or fall of 1872, of an old slack bank in the manufacture of coke?

A. I seen them take it and put it in the coke kilns—the coke ovens.

Q. 4. Please describe that old slack pile.

A. Well, it was slack taken out there and put in between the tracks; it was a kind of a hollow place there and they filled it up.

Q. 5. When was the slack put there?

A. I couldn't tell now just when it was put there.

Q. 6. At the time when it was used in the manufacture of coke what was the condition of that old slack bank as to its being wet or dirty?

104 A. I have seen it overflowed two or three time when there was a hard rain. Well, the outer edge of it was dirty; there was some mud on the outer edge and sticks and gravel.

Q. 7. Where did the water come from which overflowed it?

A. From the hillside above it—where it came from.

Q. 8. What was the condition of the water when it reached this old slack pile?

A. Well, it was muddy water when it came down the hill.

Q. 9. Did you remain with the West Fairmont Gas Coal Company after Mr. Gaskill ceased to have charge of the coke making?

A. Yes, sir.

Q. 10. How much of that old slack bank, if any, was used after that time?

A. Well, I couldn't tell.

Q. 11. Can you approximate?

A. I don't think I could come anyways near it.

Q. 12. Can you tell whether more was used before than after?

Objected to by Mr. Hubbard, witness not having shown any knowledge of the subject.

A. No; I couldn't tell that.

Q. 13. Do you know how much of that bank was used altogether? I mean what proportion of it.

A. I don't think I could tell that.

Q. 14. Who was it that took Mr. Gaskill's place as superintendent of the manufacture of coke?

A. His name was John Carowthers.

Q. 15. Do you know where he came from?

A. I believe—I don't know where he came from.

Cross-examination by W. P. HUBBARD, Esq.:

Q. 1. How high did the water come the two or three times you saw it overflow?

A. Well, it overflowed it a foot or two in places.

Q. 2. Do you mean a foot or two over the top of the slack?

A. Yes, sir.

Q. 3. Was the top of the slack at those places up above the level of the railroad tracks?

A. No, sir.

Q. 4. If below that level, how far below that level was it?

A. I think about a foot.

105 Q. 5. Did the water on any of these occasions overflow the railroad tracks?

A. Yes, it did; the inside track; it overflowed sometimes.

Q. 6. Was that the main track or the coal company's switch?

A. The coal company's switch.

Q. 7. Were these overflows before or after the slack was used for making coke?

A. These overflows were in the summer, and they commenced on their slack pile in October, I believe.

Q. 8. In how many places was the slack pile overflowed, and what was the extent of those places?

A. Well, they were rather small in extent; there were piles—it was piled up; in some places there was holes in it.

Q. 9. Question repeated.

A. Well, there was some three or four places overflowed; well, there was some of them four feet across, some six, I suppose; I couldn't tell.

Q. 10. And how far did they extend in the other direction?
A. From four to six feet each way.
And further this deponent saith not.

THORNTON L. BOGGESS.

Adjourned to June 24, 1879, on which day the cross-examination of FRANK J. HEARNE (which was suspended during the examination of two last preceding witnesses) was resumed:

Q. 121. Will you produce and file the communications mentioned by you in your examination last Tuesday?

(Witness here produced and filed five different communications, which were marked, respectively, Exhibit "V," "U," "T," "S," and "R,")

EXHIBIT "V."

FAIRMONT, W. VA., *Nov. 28th*, 1872.

Mess. Dewey, Vance & Co., Wheeling, W. Va.:

GENTS: On the 9th inst. you wrote us that on account of stoppage of furnace the week previous, and only working at half capacity that week, you were about full of Fairmont coke, and would be obliged if we would reduce our shipments to, say, one car per day.

This we have endeavored to do, but in so doing we have been compelled to overcrowd our yard with the surplus.

106 We should, therefore, be pleased to hear from you at your very earliest convenience at what time we may resume the shipments of, say, three to four cars per day.

Very truly yours,

G. R. VAN ALEN, *Pres.*
C. M. DAVISON.

EXHIBIT "U."

FAIRMONT, W. VA., *January* 14, 1873.

Messrs. Dewey, Vance & Co., Wheeling, W. Va.:

GENTS: On the 12th of last December we were requested by your Mr. Hearne to stop shipping coke to you for thirty days. As the time has expired, we should be pleased to hear from you at your earliest convenience on what day we shall commence to ship you and how many cars per day you will require.

Trusting to receive an early reply, we remain,

Yours truly,

G. R. VAN ALEN, *Pres.*
By C. M. DAVISON

P. S.—We should be pleased to receive your note at 90 days from 1st inst. in settlement of your account for coke, as we are sorely pressed for money.

G. R. V. A..
Pr. C. M. D.

EXHIBIT "T."

NEW YORK, *February* 8, 1873.

Messrs. Dewey, Vance & Co., Wheeling:

GENTS: After seeing you on the 31st ult. I gave to our book-keeper at the mines the following instructions: Messrs. Dewey, Vance & Co. consented, when I saw them to-day, that we might send them six car-loads of coke per week, but in no case to exceed that number without their order. Send them one car per day, as near as possible, as it gives them a better chance for mixing by scattering it through their other coke. Please to observe these directions and follow them explicitly."

I am pleased with our new coke boss from Connellsville, and his work, which is almost entirely different from our former
107 method of manufacture. The difference is very apparent on exposure of the coke to the weather, and I am confident that you will find it greatly improved.

I think during the spring that you will be able to increase the percentage of use very considerably; also that it would have been several thousands of dollars benefit to our company had we employed a competent person three or four months sooner.

Yours truly, G. R. VAN ALEN,
President.

EXHIBIT "S."

FAIRMONT, W. VA., *June* 11, 1873.

Messrs. Dewey, Vance & Co., Wheeling, W. Va.:

GENTS: We shall commence shipping you coke on Monday next (June 15th), unless otherwise instructed by you. We trust you are ready to receive a limited supply, and thereby relieve us in a measure from an overcrowded coke yard. It is now over two months since we received your favor asking us to suspend shipment for about thirty days.

Trusting we shall not inconvenience you, we remain

Yours truly, G. R. VAN ALEN, *Pres't*,
By C. M. DAVISON.

Answer by telegram.

EXHIBIT "R."

NEW YORK, *November* 28, 1873.

Messrs. Dewey, Vance & Co.:

GENTS: We are a little surprised at our advices from the mines relative to coke for your company. Will you oblige us by giving the reason for the order to discontinue shipping; also of prospects for further shipments.

Yours truly, G. R. VAN ALEN,
President.

WITNESS: These are all the papers we can find at the present time concerning the solicitations from the West Fairmont Gas Coal Company for renewal of shipments.

Q. 122. Is the letter signed Dewey, Vance & Co., dated December 4, 1873, now produced and filed by me, the answer made by your firm to Mr. Van Alen's letter, dated November 20, 1873, and just produced by you?

(Mr. Hubbard here filed letter of Dewey, Vance & Co., marked exhibit "Q.")

EXHIBIT "Q."

WHEELING, W. VA., *December* 4, 1873.

The West Fairmont Gas Coal Co., No. 77 & 83 Liberty St., New York, N. Y.; G. R. Van Alen, president:

DEAR SIR: Yours of the 28th inst. was duly received. We were accumulating stock and stopped shipments from Fairmont and curtailed from Connellsville; have no definite idea at what time we shall again need.

Yours truly, DEWEY, VANCE & CO.

A. I don't know.

Q. 123. Was that letter dated December 4, 1873, written by your firm?

A. It was; I notice the dates correspond and presume this was an answer to the letter of November 28.

Q. 124. Did your firm make any other answer to that letter of November 28?

A. None that I am aware of.

Q. 125. Does your letter of December 4 state fully and truly the reasons of your firm for ordering a discontinuance of shipments of Fairmont coke?

A. It states truly the facts relative to the accumulation of Fairmont coke without assigning the reasons for said accumulation.

Question repeated.

A. It does not state fully the reasons.

Q. 126. Why not?

A. I don't know.

Q. 127. Does that letter speak of the accumulation of Fairmont coke?

A. Yes, sir; it had reference to the accumulation of Fairmont coke; also an accumulation of Connellsville coke.

Q. 128. Why, then, in your answer to the next preceding question but one, did you single out "the accumulation of Fairmont coke?"

109 A. I supposed the question had reference to the accumulation of Fairmont coke.

Q. 129. What other reasons existed for stopping shipments of Fairmont coke other than those stated in this letter?

A. Our inability to use as much of it as we were receiving.

Q. 130. Do you know why that reason was not stated in this letter?

A. I do not.

Q. 131. Were you unable to use as much Connellsville coke as you were receiving at that time?

A. We were.

Q. 132. Was there any reason for your action with regard to the shipments of Fairmont coke which did not apply to shipments of Connellsville coke?

A. Yes.

Q. 133. What?

A. Owing to the bad working of the furnace produced by using Fairmont coke, our daily consumption of coke was reduced until it became less than our shipments; hence, an accumulation of coke in stock.

Q. 134. Was there any other reason?

A. The inferior quality of the Fairmont coke. I don't know of any other reasons at present.

Q. 135. Do you know why your firm, in this letter of December 4, didn't give the reasons you now state when asked by Mr. Van Alen's letter of November 28 these reasons for ordering shipments of Fairmont coke to be discontinued?

A. I know of no reason, unless the fact that our secretary, who wrote the letter, had no personal knowledge of the coke, and was inclined to be more courteous and forbearing than our managers of manufacture would have been.

Q. 136. Was he a member of your firm?

A. He was.

Q. 137. Do you mean that the difficulties attending the use of Fairmont coke which you have mentioned had not been brought to his attention by other members of the firm, including the managers of manufacture?

A. I do not remember. Wait; that is not an answer to the question. Please read the question. (Notary reads the question over.) I do not mean that.

Q. 138. What, then, do you mean by the personal knowledge of your secretary?

A. I mean his personal attendance at the furnace where
110 the coke was consumed, and where a full knowledge could be obtained concerning the coke.

Q. 139. Hadn't the secretary heard from the other members of the firm, managers of manufacture included, of the difficulties attending the use of Fairmont coke?

A. I do not remember.

Q. 140. Had you never spoken of them in his presence?

A. I do not remember, but presume that I had.

Q. 141. Was your secretary accustomed to answer such letters as that of November 28 without either personal knowledge or information from those members of the firm who had personal knowledge?

A. It seems that he did answer that one.

Q. 142. Was that his habit?

A. I can't say; I see very little of his correspondence.

Q. 143. Did you ever know of another instance where he did so?

A. I do not remember a like reason ever existing.

Q. 144. Have you any other answer to the question?

A. None.

Q. 145. When did your furnace first go into blast?

A. February, 1872.

Q. 146. What records of its consumption and production have been kept?

WITNESS: I hardly understand that question. If you change the form of it I can probably give you an answer.

Mr. HUBBARD: Make any changes you wish and then answer.

WITNESS: If you ask have we kept a record of consumption and production I answer a partial one.

Q. 147. What is shown by that record?

A. It shows for each period of two weeks the consumption of all material and the production of pig iron, but does not enumerate the kinds and quantities of coke used. It gives only total amounts of coke used.

Q. 148. Will you produce that record for the time between February, 1872, and January 1, 1874, inclusive?

A. I will.

Q. 149. Has any record been kept of the tests of the quality of the iron made by the furnace or of the quality itself?

A. We haven't kept any record of the tests.

Q. 150. Have you of the quality of the iron produced from time to time?

A. We may have, so far as pertains to the color of the iron,
111 whether white, mottled, or gray, but nothing showing whether the iron was good, bad, or indifferent.

Q. 151. Will you produce such record covering the same period?

A. I will if it can be found.

Q. 152. Will you produce all records which your firm has relating to your furnace from February, 1872, to January 1, 1874, inclusive?

A. I will bring all the records pertaining to the consumption of stock and the iron produced during that period.

Q. 153. Have you ever made any other statement under oath than that in your present examination of the damages suffered by your firm from the West Fairmont Gas Coal Company?

A. I have not.

Q. 154. Have you ever prepared any such statement to be incorporated in a paper which you knew was to be sworn to by Mr. Vance or any other member of the firm?

A. I think I did.

Q. 155. Didn't you yourself swear to a plea filed in the circuit court of Ohio county which stated the amount of those damages?

A. If I did I have forgotten it.

—. Look at the paper handed you, filed and marked Exhibit "P," and state whether you did not make oath to that paper in the form it now is, except that in the fifth line the words "commencement of this suit have" stood in place of the words "27th day of November, 1874," and that in the seventh line from the end the figures "13,562" stood before the word dollars in place of the figures "15,400."

EXHIBIT "P."

In the Circuit Court of Ohio County. April Term, 1877.

ORVILLE C. DEWEY, CHAUNCY DEWEY, and Others, Surviving Partners, &c.,

ads.

THE WEST FAIRMONT GAS COAL COMPANY.

2. For a further plea in this behalf the defendants say that on the first day of October, 1872, the plaintiff was, and since that time until the commencement of this suit has continued to be, a manufacturer and producer of coke near the town of Fairmont, in Marion county, in this State, for the purpose of selling the same to
112 others; and the defendants on the said first day of October, 1872, were, and since that time until the 27th day of November, 1874, continued to be, manufacturers and producers of iron at and near the city of Wheeling, in this State, using and requiring in their said manufacture and production *of* large quantities of coke, of all which the plaintiff at the several times in this plea mentioned had notice; and after the first day of October, 1872, and before the commencement of this suit, to wit, on the 4th day of October, 1872, in consideration that the defendants, at the special instance and request of the plaintiff, had then and there undertaken and promised to buy of the plaintiff a large quantity of coke, to wit, an average of three car-loads of coke per day from the day and year last mentioned to the first day of July, 1873, for certain large prices then and there agreed upon by and between the defendants and the plaintiff, to wit, six cents per bushel of forty-one pounds, to be settled by notes of the defendants at ninety days from the first day of each month for the previous month's deliveries, the plaintiff undertook and then and there faithfully promised the defendants to manufacture and produce for them and to furnish and deliver to them the quantity of coke aforesaid, to be of merchantable quality and to be reasonably fit to be used for the manufacture and production of iron, the plaintiff then and there well knowing that to be the purpose for which the defendants made the said purchase, which undertaking and promise of the defendants to the plaintiff and of the plaintiff in consideration thereof to the defendants are the same contract, undertakings, and promises by and between the defendants and the plaintiff set forth in the plaintiff's declaration in this suit; and the defendants say that they, confiding and relying on the promise and undertaking aforesaid of the plaintiff, did afterwards, to wit, on the fourth day of October, 1872, and on divers other days and times thereafter and before the commencement of this suit, take and receive of and from the plaintiff a large quantity of coke, to wit, two hundred and forty-six car-loads thereof, pursuant to the undertaking and promise of the defendants aforesaid, as and for the coke so to be bought by the defendants as aforesaid, which the plaintiff then and there furnished and delivered as and for the coke to be furnished and delivered by the plaintiff as aforesaid, and did settle

for the same, pursuant to their undertaking and promise aforesaid, by their notes at ninety days from the first of each month for the previous month's deliveries, and did duly pay all of the said notes, and did use and attempt to use a
113 large quantity of the coke so delivered, to wit, two hundred and forty car-loads thereof, in the manufacture and production of iron. Nevertheless, the said plaintiff, not regarding its promise and undertaking aforesaid, but contriving and intending to deceive and defraud the defendants in this behalf, did not nor would it at any time after it made its promise and undertaking aforesaid, though often requested so to do, manufacture and produce for said defendants or furnish and deliver to them the quantity of coke of merchantable quality or fit to be used in the manufacture and production of iron which said plaintiff undertook to furnish and deliver as aforesaid or any part thereof; and the coke which was furnished and delivered by the plaintiff to the defendants was of bad quality and unmerchantable and unfit to be used in the manufacture and production of iron, by reason whereof the defendants not only lost all the benefit, profit, and advantage which they otherwise would have derived from the purchase of said coke and its use as aforesaid, but sustained great damage and loss and were put to great expense, and large quantities of iron in the manufacture of which the defendants had used and attempted to use as aforesaid a portion of the coke so furnished and delivered were damaged and deteriorated in value, and the coke so furnished and delivered was, in fact, worthless and of no value, and the price so paid for the same by the defendants was lost, and the business of the defendants as manufacturers and producers of iron was greatly interrupted, delayed, and prejudiced; and the defendants, in fact, say that by reason of the matters contained in this plea they are entitled to demands of and from the plaintiff a large amount of damages, to wit, $15,400, and to set off so much as may be necessary of the last-mentioned sum against the damages, if any, to which the plaintiff may be entitled by reason of the matters contained in the declaration, and are entitled to judgment against the said plaintiff for so much as the damages to which the defendants are entitled as aforesaid may exceed the damages, if any, to which the plaintiff may be entitled as aforesaid; and the defendants now here offer to make such set-off, and pray judgment against the plaintiff as aforesaid; and this the said defendants are ready to verify.

W. H. HEARNE & D. LAMB,
Attorneys for Defendants.

STATE OF WEST VIRGINIA, *Ohio County,* } *To wit:*

Before me this twenty-third day of April, 1877, came Frank
114 J. Hearne, one of the defendants in the above suit, and made oath in due form that the matters alleged in the foregoing plea, so far as they are stated of his own knowledge, are true, and so far as they are stated upon information from others he believes them to be true.

SAMUEL B. McCOLLOCH, *Clerk.*

A. I think I did, but I had forgotten it.

Q. 157. Didn't you also make oath to another plea, it being a copy of that paper in the form it now is?

A. I do not remember.

Q. 158. What was the statement you made intended to be sworn to by Mr. Vance or some other member of your firm?

A. I do not remember what that statement was.

Q. 159. Have you any means of ascertaining?

A. I have not.

Q. 160. Will you look at the bill in this cause now handed you and state whether the allegations therein contained, respecting the damages suffered by your firm, are in accordance with the statement of damages which you furnished for the purpose of being sworn to?

A. I think they are.

Q. 161. Why are the statements as to damages in the bill in the sworn plea and in your testimony so different?

A. My recollection is that in the original plea the damages consisted of two items only, as enumerated in the bill. The first item ought to be exact and can be made so by a transcript from our books. The second item—there is no record kept concerning it, and can only be arrived at by approximation. In my testimony given there are three items, to two of which all of that said above applies. A third item has been introduced, claiming damages caused by the irregular working of the furnace, apart from the quality of the iron. This item is arrived at by approximation, and not embraced in the original plea.

Q. 162. What is the nature and the amount of each of the two items comprised in the original plea?

A. The first item for difference paid for Connellsville coke that was used in lieu of the Fairmont coke contracted for was $8,618.12. The second item was for deterioration in quality of pig iron—was $6,784.

Q. 163. Do not those sums aggregate $15,402, while the total amount stated in the original plea was but $13,562?

115 WITNESS: I would like to ask what were the figures in this plea when it was sworn to?

Mr. HUBBARD: That is for you to say.

WITNESS: I have no recollection of the amount.

Q. 164. Didn't you state a short time ago that you swore to that plea when the figures 13,562 stood before the word dollars instead of the figures 15,400.

WITNESS: Where is my answer to the question? I stated that I thought I had sworn to it, but had no recollection of it.

Q. 165. If you stated that you thought you had sworn to it will you state what is comprised in the sum $13,562 mentioned in it?

A. Two items: First, difference in value of Connellsville coke used in lieu of the Fairmont coke contracted for but not delivered; second, the bad quality of pig iron produced while using Fairmont coke; this last item is approximated.

Q. 166. Did the sworn plea state that any portion of the $13,562 was approximated?

A. I don't think it did.

Q. 167. Will you state the amount of the two items stated in your last answer but one?

A. I cannot.

Q. 168. Can you state how you arrived at that sum, $13,562?

A. I cannot now.

Q. 169. Haven't you the same means of information now that you had then?

A. I have on the first item.

Q. 170. What, then, was the amount of it?

A. I do not remember.

Q. 171. Have you any way of ascertaining?

A. I do not believe that I can exactly.

Q. 172. Will you come as near it as you can?

A. That is already done in my testimony.

Q. 173. You stated in your testimony, did you not, that the item of the difference in price of Connellsville coke used instead of Fairmont coke was $6,307.47?

A. I did.

Q. 174. Was that the amount of the first item comprised in the $13,562?

A. It was intended to represent, as near as could be ascertained, what that class of damage was, but varies from the amount named in the plea.

Q. 175. How much does it vary from that?

116 A. The difference between $8,618.12 and $6,307.47.

Q. 176. Was $8,618.12 the amount of the first item which went to make up the $13,562?

A. I think it was very nearly that amount.

Adjourned to June 25, 1879, on which day the cross-examination of FRANK J. HEARNE was resumed:

Q. 177. Haven't you the same means of information now that you had then with reference to the second item comprised in the $13,562?

A. I have no distinct recollection of what data were employed in making the estimates for the item of $13,562, but that estimate was withdrawn and another estimate of $15,402.12 substituted therefor, we having reason to believe that greater damage could be shown than what was embraced in the first estimate; both estimates are only approximations and can be easily made to vary by slight modification in the data assumed; I am now prepared to state the data assumed in the preparation of the second estimate showing $15,402.12; since testifying yesterday I have found the original statement which I prepared, showing all the data employed in reaching the result of $15,402.12.

Q. 178. Whether you have any recollection or not of the data employed in making the estimate of $13,562, were not the data

then used the same used by you in making your subsequent estimates?

A. I have no recollection of what they were.

Q. 179. Were your data facts?

A. I suppose partly facts and partly assumptions or approximations.

Q. 180. Do you mean that your affidavit to the plea filed here was based in part on your assumptions?

A. There were certain kinds of damages sustained by us; for instance, the working in our own forge of inferior pig iron, and when, by reason of admixture with better qualities of iron, the care required in its manipulation in the mill, our anxiety while marketing the finished products—cannot possibly furnish exact data or facts for making an estimate; we kept no record of how much of the iron produced of white or mottled gray grades or weak gray was used in our mill; hence it is necessary to make assumptions and approximations based on the best data at our command, coupled with the recollections of ourselves and our employés.

117 Q. 181. Have the best data at your hand or the recollections of yourselves and your employes changed from time to time?

A. I suppose they have been subject to some modifications and changes, and resulted in the insertion in my testimony of an entirely new element of damage. The third item of damage in my testimony has not appeared or been claimed in former estimates.

Q. 182. What changes or modifications of the data at your hand have occurred?

A. In the item of damage caused by the substitution at an increased cost to us of Connellsville coke for the Fairmont coke which was not delivered on our contract we have made certain changes which might require quite elaborate tabular statements to show why we affix different prices for the same kind of coke in our two estimates. In my testimony we assumed the price of Fairmont coke to be six cents per bushel of forty-one pounds on board the car at the mines; we also assumed that the rate of transportation was twenty dollars per car-load, and that a car-load consisted of six hundred bushels, which was the amount nominally allowed by the railroad company; this would make the cost of transportation equal to three and one-third cents per bushel, which added to the cost at the mines, six cents per bushel, would make a cost to us, delivered at our furnace — nine and one-third cents per bushel; but in looking over our receipts of Fairmont coke during the time embraced between the 1st of September, 1872, and the 1st of December, 1873, I find that the monthly average bushels per car-load actually received by us were as follows: September, 1872, 30 car-loads, averaged 603 bushels per car; October, 1872, 62 car-loads, averaged 613 bushels per car; November, 1872, 29 car-loads, averaged 620 bushels per car; December, 1872, 17 car-loads, averaged 636 bushels per car; January, 1873, 5 car-loads, averaged 637 bushels per car; February, 1873, 19 car-loads, averaged 608 bushels per car; March, 1873, 26 car-loads, averaged 625 bushels per car; August, 1873, 24 car-loads, averaged

635 bushels per car; September, 1873, 18 car-loads, averaged 612 bushels per car; October, 1873, 26 car-loads, averaged 641 bushels per car; November, 1873, 20 car-loads, averaged 597 bushels per car.

Now, by taking the cost at the mines at six cents per bushel, and by dividing the rate of twenty dollars per car-load by each of the above eleven averages per car, and adding the results to
118 the cost at the mines, we have eleven different values for Fairmont coke delivered at our furnace, and it may be stated that for purposes of estimation it is usual to consider the car-load to be equal to six hundred bushels (the amount nominally allowed by the railroad company), though it is not usual to charge for an excess over six hundred bushels, providing that excess be not too great; nor is it usual to allow any drawback or rebate to the shipper if the car contains less than six hundred bushels. For purposes of estimation it is also customary to employ any data shown by the results of actual shipments to determine the probable cost of coke. The coke embraced in these estimates for the plea, the bill, and my testimony has not been delivered and it might be considered, fairly, I think, a matter of assumption or approximation in determining which of the above averages must be employed, and what the resulting value of the coke delivered at our furnace would be. This, I think, should clearly show why coke should in one case be estimated at 9⅓ cents per bushel, when the same coke in another estimate is valued at 9.22 cents per bushel; 9.22 cents per bushel was the price used in estimating our damage in the plea of $15,402.12. The principles above applied to the values of Fairmont coke are equally applicable to the values of Connellsville coke. I find that our monthly average receipts per car-load of Connellsville coke for a series of months commencing with September, 1872, were 547 bushels per car, 583 bushels per car, 595 bushels per car, 586 bushels per car, 610 bushels per car, 612 bushels per car, 600 bushels per car; and the list might be extended further if desired. The rate paid for transportation was forty dollars per car-load, regardless of whether the car contained 547 bushels or 612 bushels. The cost at the mines was five cents per bushel of forty pounds, which, added to the cost per bushel for transportation, gives for a fair valuation 11.31 cents per bushel for Connellsville coke delivered at our furnaces; this was the value employed in our estimate in the plea wherein we claim damages in the amount of $15,402.12.

It must also be borne in mind that a bushel of Fairmont coke, by agreement, was forty-one (41) pounds, and a bushel of Connellsville was forty (40) pounds; hence, for ascertaining difference in values, it is admissible to add one-fortieth to the value of a bushel of Connellsville coke to bring it to an equivalent bushel of Fairmont coke. In my testimony I employed the more direct and easier method of determining the value of Connellsville coke, though not strictly
119 accurate. I assume the car-load to consist of six hundred bushels, or the nominal amount allowed by the railroad company. The charge for transportation is forty dollars per car-load, or six and two-third cents per bushel, which, added to the cost of the coke at the mines of five cents per bushel, is equal to eleven and

two-thirds cents per bushel delivered at our furnace. I have not added the one-fortieth to the cost of the Connellsville coke to bring it to an equivalent bushel of Fairmont coke. My estimate for the $15,402.12 plea was made as follows: The cost of West Fairmont coke delivered at our furnace was 9.22 cents per bushel; the cost of Connellsville coke delivered at our furnace was 11⅓ cents per bushel. From October 6, 1872, to November 30, 1873, were used 1,592,028 bushels of all kinds of coke, producing 17,832 tons of pig iron. We actually used, during the continuance of shipments of Fairmont coke in making the iron above named, 1,439,340 bushels Connellsville coke, at 11⅓ cents per bushel, equal to $165,521.10; 152,688 bushels of Fairmont coke at 9.22 cents per bushel, equal to $14,077.83, or a total of 1,592,028 bushels of coke, costing in the aggregate $179,601.93. If the West Fairmont Gas Coal Company had not supplied an inferior article, but had furnished coke equal in quality to that shipped in the month of September, 1872, we could, and would, have used one-third of the entire quantity of Fairmont coke. There would have been used in making the above iron as follows: 1,061,352 bushels Connellsville coke at 11⅓ cents per bushel, equal to $122,055.48; 530,676 bushels of Fairmont coke at 9.22 cents per bushel, equal to $48,928.33, or a total of 1,592,028 bushels of coke, which would have cost us $170,983.81, but the same quantity of coke as above did actually cost us $179,601.93, resulting to us in a loss of $8,618.12, by reason of the failure of the West Fairmont Gas Coal Company to supply us with a quality of coke equal to their sample, while in my testimony I have only claimed difference between 11⅔ cents per bushel for Connellsville coke, which was used in lieu of Fairmont coke costing 9⅓ cents per bushel, or a difference of 2⅓ cents per bushel. This difference applied to 436 car-loads, which we claim were not delivered, and estimating each car-load to contain 620 bushels, we have 436 cars multiplied by 620 bushels per car, equal to 270,320 bushels of Fairmont coke which should have been delivered, but was not. This amount, 270,320 bushels, multiplied by 2⅓ cents per bushel, is equal to $6,307.47, or the amount of loss sustained by us by reason of having been compelled to sub-
120 stitute Connellsville coke for 436 car-loads of Fairmont coke not delivered. This average of 620 bushels per car is almost exactly the average per car of all the car-loads of coke received by us from Fairmont. I think the prices of coke in the $15,402.12 estimate are the actual average prices of coke delivered at our furnace as shown by our books. In my testimony I have only attempted an approximation. I consider either method entirely fair, considering that the difference is entirely conjectural, the coke never having been delivered, but a delivery was contemplated in our contract. I assume in my testimony that we received 170,783 bushels of Fairmont coke, including the trial lot, and that 49 car-loads were good coke, equal to 49 cars mutiplied by 620 bushels, equal to 30,380 bushels. 170,783 less 30,380 is equal to 140,403 bushels of inferior coke received from Fairmont. If that quantity, 140,403 bushels, had been used in proportion one-third Fairmont and two-thirds Connellsville, and assuming 90 bushels of coke of all kinds required

to produce a ton of iron, we would have 140,403 divided by 30, equal to 4,680 tons of pig iron, assuming 3,180 tons, or about two-thirds of the above amount, to be white and mottled iron, and at the same time weak. This I estimate was deteriorated to the extent of four dollars per ton, equal to $12,720 loss incurred by us. Assuming 1,500 tons of the above 4,680 tons to be gray and apparently of good quality, but proven by tests to be weak and rotten red short, I estimate this amount deteriorated to the extent of two dollars per ton, equal to $3,600; this added to the $12,720 gives total, $15,720 loss which would have been incurred by us had the inferior coke been used by us in the proportion of one-third; but we preferred to use the coke in smaller proportions and reduce the damage on each ton of iron to a corresponding extent, and distribute the loss over a larger number of tons of iron; but the loss accruing in the aggregate from the small number of tons at the increased damage per ton was the same as the aggregate loss actually incurred by us for a larger number of tons at a lower rate of deterioration per ton, or $15,720 loss by either method of using the coke. In my testimony I assume, by irregular working of the furnace by reason of the use of this inferior Fairmont coke tending to produce white and mottled iron, there was an actual loss incurred by us, first, by the waste of iron carried off in the cold and black slag, increased consumption of fuel, and the increased cost of the item of fixed expense and labor per ton of iron produced. This
121 damage I estimate at five per cent. of the approximate average costs of producing a ton of iron, which, with labor added, was about $30 per ton. We have five per cent. of $30, equal to $1.50, multiplied by 3,000 tons of white and mottled iron produced, equal to $4,500. This waste of iron just alluded to and irregular working of the furnace rarely accompanies the production of gray iron; and we apply in our estimate the loss of $1.50 per ton only to the 3,000 tons of white and mottled iron. In our estimate of damage in the $15,402.12 plea we assumed a different basis for estimation from that employed in my testimony. It was about as follows: While using the Fairmont coke, 152,688 bushels in varying proportions, we were subject to damage and loss by deterioration of quality of pig iron and loss and waste of stock (by reason of bad working of the furnace) equal to four dollars per ton on a quantity of pig iron equal to the amount which the Fairmont coke actually used would have produced, if used without admixture with other and better coke; the amount of Fairmont coke, 152,688 bushels, divided by 90 bushels, required to produce each ton of pig iron, would equal 1,696 tons of pig iron, which multiplied by $4 per ton damage would equal $6,784; this amount added to the amount $8,618.12—already referred to as resulting from the substitution of Connellsville coke for 436 car-loads of Fairmont coke—gives the total damage as stated in the plea, $15,402.12. In my testimony I have claimed, first, damage for substitution of Connellsville coke for Fairmont coke, amounting to $6,307.47; second, damage resulting from depreciation in quality of iron made from inferior Fairmont coke, amounting to $15,720; third, damage resulting from waste of iron and increased cost of produc-

tion resulting from the inferior quality of the Fairmont coke used, amounting to $4,500, or total damage from all causes stated above, amounting to $26,527.47. Where the above estimates are not based, on facts susceptible of proof, they are based upon assumptions and approximations which are correct to the best of my knowledge and belief.

Q. 183. Have the facts changed any since you made your first estimate?

A. I am not aware that the facts have changed any at all; but we have concluded to claim more damages, believing that we did not claim all that we were entitled to in the first claim.

Q. 184. When did you first discover that you hadn't claimed all that you were entitled?

122 A. I am not aware that we have made any discovery of that kind. We were conscious from the beginning of great damage, but chose to enter claims and prove so much as stated in our former pleas.

Q. 185. Did you believe you had just claims greater than those stated in your pleas?

A. We did.

Q. 186. Why didn't you set up those claims?

A. We claimed only what we thought we could prove at that time.

Question repeated.

A. Because we did not desire to do it.

Q. 187. Why didn't you desire to do it?

A. We preferred to enter claim for what we could clearly prove.

Q. 188. In that answer you state why you set up the claims you did set up; the question is, why you did not set up the other claims which you thought you had?

A. I don't know, unless we had some doubts at that time of making them as apparent to others as they were to us; in other words, our having doubts at that time of being able at that time to prove them.

Q. 189. Has anything since occurred to remove those doubts?

A. There has.

Q. 190. What?

A. The evidence in this suit will show.

Question repeated.

WITNESS: I decline to answer; I decline to make further answer.

(The defendants object to closing, filing, or reading of this deposition until the last preceding question is answered.)

Q. 191. When did you first conclude to claim more damages?

A. It was after the other claim was filed.

Q. 192. About how long was it after the facts occurred out of which the claim arose?

A. I don't remember.

Q. 193. Wasn't it at least five years?

A. I don't think it was quite that long.

Q. 194. Wasn't it at least four years?

A. I presume it was.

Q. 195. Do you know why your firm was so long in coming to that conclusion?

A. I do not.

123 Q. 196. How many times has your firm concluded to claim more damages than it had theretofore claimed?

A. I think twice.

Q. 197. Were some of the doubts that surrounded those claims removed each time?

A. I presume they were.

Q. 198. Can't you do more than presume about it—can't you answer from your knowledge?

A. I can; yes.

Q. 199. Well, what do you know about it?

WITNESS: Know about what?

Mr. HUBBARD: About the removal of doubts that surrounded your increased claims.

A. The first change was made on account of an imperfect knowledge of the data when the first estimate was made. The second change I have already declined to answer.

Q. 200. What had occurred at the time of the first change to give you a more perfect knowledge of the data?

A. A greater familiarity with our receipts and consumption of material and a refreshing of our memories.

Q. 201. How long after the facts occurred was this first change made?

A. I don't know.

Q. 202. Wasn't it at least four years?

A. I think it was.

Q. 203. How had you in that time acquired a greater familiarity with your receipts and consumption of material?

A. By reference to our books.

Q. 204. Didn't your books show the same facts when you made your first estimate?

A. I suppose they did.

Q. 205. How, then, could a reference to the books give you a greater familiarity?

A. It was done with more care.

Q. 206. Didn't you refer to your books when you made your first estimate?

A. We did.

Q. 207. Didn't you do so carefully?

A. I think not—not with as great care as we did afterward.

Q. 208. Didn't your books show you exactly the same things when you made your first estimate as when you made the first change in it?

124 A. The same things were in the books, but were not examined with the same care.

Q. 209. Why didn't you examine them with the utmost care when you were in search of matters to which you were to make oath?

A. I supposed at the time that they were examined with the utmost care, but found afterwards that they were not.

Q. 210. Did you make the examination at either time?

A. I did not at the first, but assisted at the second time.

Q. 211. By the "first" do you mean the time the plea was prepared to which you made affidavit?

A. I do.

Q. 212. How long was it after you made the first estimate until you made the first change in it?

A. I don't remember, but think it was only a few days.

Q. 213. When did you first think of the third item of damage of which you speak in your testimony?

A. The same item was embraced in the other estimates, but not put in separate form.

Q. 214. What form was it put in in the other?

WITNESS: What item do you refer to?

Mr. HUBBARD: The third item of damage in your testimony.

A. It was put in with the second item of the estimate.

Q. 215. Did you not testify during your examination as a witness to the effect that the third item was for the first time introduced in your testimony?

A. I did, and so it is introduced for the first time in separate form.

Q. 216. Did you not also testify that the third item is not embraced in the original plea?

A. I don't remember if I did; but at that time the estimate was not in my possession and I was speaking from recollection. I find, since getting possession of the estimate, that in the item for deterioration of iron produced the waste of iron is mentioned, though I do not remember that any specific amount in that claim was made for waste of iron. I think that nothing in the estimate is said about increase of fixed expense or increased cost of labor.

Q. 217. Have you now any estimate that has reference to the original plea of which you spoke when you said that the third item is not embraced in the original plea?

A. I have not. My understanding of the original plea in my testimony was the plea for which I now have the estimate.

125 Q. 218. Was not the question in answer to which you said, "the third item is not embraced in the original plea," a question relating to the sworn plea, and had any sworn plea been testified to at that time by you, except "P," of your deposition?

Question objected to for the reason that Exhibit "P," with its interlineations and erasures, — in reality two pleas, and because it does not appear from the exhibit or the testimony which of the two forms contained in that paper was referred to.

A. The plea sworn to by me, as I stated yesterday, was entirely beyond my recollection, and if the question had reference to that plea it was not apprehended by me, as my testimony had reference or was intended to refer to Exhibit "P," with the erasures made. Exhibit "P" had not been shown to me at that time.

Q. 219. Had not that paper been before that shown you, handed you and filed, and had you not testified that you thought you had made oath to that plea in the form it now is except as to two erasures and interlineations mentioned, one of these being the amount of damages?

A. I do not remember whether it was before or after.

Q. 220. If you do not now remember whether it was before or after, how can you say, as you do in your last answer but one, that "Exhibit P" had not been shown you at that time?

A. The reference made by Mr. Hubbard was understood by me as having been on the direct examination, and at that time I had not seen "Exhibit P" nor had any recollection of it.

Q. 220½. Was it not but a very few minutes?

Adjourned to June 26th, 1879, on which day the cross-examination of the witness, FRANK J. HEARNE, being resumed as follows:

WITNESS: I wish to state that it has been and is yet my desire to relate freely all that I know about this case, and that if Mr. Hubbard desires to renew his questions of yesterday, which he thought were not fully answered, I will endeavor to answer them this morning.

Q. 221. What has occurred since the first estimate of damages made by your firm, and stated at $13,562 in the plea to which you made affidavit, to remove the doubts that you had at that time of your being able to prove the additional claim which you thought you had?

A. I have no positive recollection now of how the $13,562 estimate was made, but think that the increase was made to
126 $15,402.12, after having made a more careful inspection of the average car-loads and average cost of Fairmont and Connellsville coke delivered at our furnace. I think that the difference between the two amounts stated was probably due to the difference in estimating what the probable cost of Connellsville coke was which was substituted for the 436 car-loads of Fairmont coke which was not delivered. I think that my testimony yesterday upon the subject of differences in values of coke will make this matter clear. The $15,402.12 estimate was prepared for our firm and represented at the time their views, while my testimony given in this case concerning the amounts of damage represent my personal views.

Q. 222. The second claim made by your firm is that stated in the bill in this cause, is it not?

A. Yes, sir; I think that is.

Q. 223. What doubts that your firm then entertained respecting their ability to prove additional claims have since been removed?

WITNESS: That is, since when?

Mr. HUBBARD: Since the estimate in the bill was made and doubts were entertained as to your ability to prove additional claims.

A. I don't know that I have been entirely correct if I have given the impression that the doubts were with the company. The doubts were personal with myself.

Q. 224. Why, then, did you answer on yesterday, "I don't know, unless we had some doubts at that time of making them as apparent to others as they were to us; in other words, our having doubts at that time of being able to prove them?"

A. I don't know of any reason other than the habit of referring ordinarily to our business matters in the phraseolgy of we or our instead of using the personal pronoun I.

Q. 225. Will that explain the two following questions and answers: "How many times has your firm concluded to claim more damages than it had theretofore claimed?" Answer: "I think twice." Question: "Were some of the doubts that surrounded those claims removed each time?" Answer: "I presume they were."

A. I think that explanation is satisfactory, considering that my personal actions usually represented the firm.

Q. 226. Did they in this instance?

A. I think they did.

Q. 227. Then were you not correct if you gave the impres-
127 sion that the doubts were with the company as well as with yourself?

A. So far as I represented the company it was correct.

Q. 228. Have you not just said that you represented them in this instance?

A. Yes; by personal action.

Q. 229. Then I ask, again, what doubts your firm then entertained respecting their ability to prove additional claims have since been removed?

A. My views corncerning the damages have always been that the damages were greatly in excess of what we would be able to prove, the proof consisting largely of estimations and approximations based upon our best recollection and the manner in which the material was consumed and the quality of the product produced. In the bill, I refer to the $15,402.12. I do not consider that I estimated by the best method how the coke was consumed and what the product would be and what the resulting damage was, though I thought at the time that it was all that I could show plainly or prove. I now believe that, insomuch that I know the quality of the iron produced from a mixture of one-third of the inferior coke was deteriorated to the extent claimed, I clearly believe that we are entitled to damage on the amount of iron which the entire quantity of inferior coke consumed would have produced if used in that proportion. This is more fully set forth in my testimony.

Q. 230. Is that all that constitutes the removal of the doubts which your firm entertained respecting their ability to prove additional claims?

A. That's all that I think of.

Q. 231. The time the bill was filed, hadn't you seen as much of the effects of the use of Fairmont coke in your furnace as you have now?

A. I had seen as much, but of course my recollection was not as fresh and full as at the present time.

Q. 232. Do you mean that your recollection was not as fresh in 1877 as in 1879 of what happened in 1872 and 1873?

A. I mean that I had not made the mental effort in 1877 to recall the events of 1872 and 1873 as I have done during 1879 to recall those events, by reference to all data in my reach and revival of personal recollections by interviews with persons who were associated with the events of '72 and '73.

Q. 233. What events that happened in '72 and '73 do you recall now that you didn't recall in 1877?

128 A. I do not remember any now in particular.

Q. 234. Why did you yesterday decline to answer the question respecting your firm's additional claims?

A. I thought that I had furnished an answer, which Mr. Hubbard chose not to consider sufficient, and I declined, not to answer, but declined to make further answer.

Q. 235. Was that the only reason?

A. I had no other reason.

Q. 236. Have your personal views and the views of your firm differed, either with regard to the $15,402 estimate or your present estimate of damages?

WITNESS: I can't catch the meaning of your question.

Mr. HUBBARD: You have said this morning "the $15,402 estimate" was prepared "for our firm and represented at the time their views, while my testimony given in the case concerning the amounts of damage represent my personal views." Have your personal views and the views of your firm differed with regard to either estimate?

A. Our firm is not familiar with my testimony. In regard to change of personal opinion, I think that was answered a little while ago and reasons assigned for my change in opinion.

Q. 237. Was there any difference in views respecting this $15,402?

A. I am not aware that there were any differences of opinion.

Q. 238. Why, then, did you seek this morning to distinguish between the firm's views and your personal views respecting that estimate?

WITNESS: Which estimate?

Mr. HUBBARD: The last one mentioned.

WITNESS: Do you mean the estimate in my testimony or in the bill?

Mr. HUBBARD: I mean and have said the $15,402 estimate.

A. Because, as I have said, that I am not aware that the firm's views have changed, while I have also said that my own views have changed and gave the reasons for the change.

Q. 239. If it is true, as you said yesterday, that the third item of damage mentioned in your testimony was embraced in the other estimates, but not put in separate form, how can it be that, as you also said, certain changes resulted in the insertion in (to use your own language) "my testimony of an entirely new element of damage; the 3d item of damage in my testimony has not appeared or been claimed in former estimates?"

129 A. In my testimony yesterday I think I stated that under the head of deterioration of iron the words "waste of iron" were also used in the plea, but no specific amount named for the waste of iron. I also stated that increased cost per ton of product, for fixed expense and labor, were not referred to in the estimate for the plea, and I repeat the same assertions to-day in answer to the question. I don't think that the question fully quotes what I said yesterday; that's my recollection.

Q. 240. Didn't the third item of damages in your testimony include waste of stock and increased cost per ton for fixed expense and labor?

A. It did.

Q. 241. Did you not say yesterday that that third item of damage was embraced in the other estimates, but not put in separate form?

(Witness referred to the deposition here. L. F. Stifel, N. P.)

A. I did, but immediately after, in reply to the question, "Did you not testify that the third item is not embraced in the original plea?" I answered, "I do not remember if I did; but at that time the estimate was not in my possession, and I was speaking from recollection; I find, since getting possession of the estimate, that in the item of deterioration of iron produced the waste of iron is mentioned, though I do not remember that any specific amount in that claim was made for waste of iron; I think that nothing in the estimate is said about increase of fixed expense or increased cost of labor." In my testimony to-day I desire to reaffirm that which I said yesterday.

Q. 242. Had you, before that, testified that certain modifications and changes had resulted in the insertion in your testimony of an entirely new element of damage, and did you say "the third item of damage in my testimony has not appeared or been claimed in former estimates?"

A. I think, perhaps, I did.

Q. 243. You said yesterday that you actually used, during the continuance of shipments of Fairmont coke, 1,439,340 bushels Connellsville coke, at $11\frac{1}{2}$ cents per bushel; is that correct?

A. It is, to the best of my knowledge and belief.

Q. 244. Haven't you testified that during the most of that period you paid less than $11\frac{1}{2}$ cents per bushel for Connellsville coke?

A. I don't remember that I did; I gave exact prices of Connellsville coke; the evidence will show.

130 Q. 245. Did you not testify, and is it not the fact, that Connellsville coke cost you $11\frac{1}{6}$ cents per bushel during the months of July and August, '73; $11\frac{1}{2\,4}$ cents per bushel during September and October, '73; $10\frac{5}{1\,2}$ cents per bushel during November, December, and January?

A. I did so testify, and also stated that these prices were approximate and based upon the price at the mines with the cost of transportation added. This transportation, I stated, was $40.00 per car for 600 bushels; I showed in my testimony yesterday what the actual contents of the cars were, which would give exactly a differ-

ent price for coke every month; I also testified that the price of Connellsville coke delivered at our furnace from August, '72, to July, '73, was 11⅞ cents; also based upon 600 bushels contained in each car-load. By January, I understand January, 1874.

Q. 246. Do you still mean to say that during the continuance of shipments of Fairmont coke you used 1,439,340 bushels Connellsville coke at 11½ cents per bushel?

A. That is true, to the best of my knowledge and belief.

Q. 247. Although during November Connellsville coke cost you but 10 5/12 cents per bushel?

A. I have so stated the price, as approximated for November, to be 10 5/12 cents per bushel; my meaning I supposed would be clear and fully understood, that the price, 11½ cents., was intended to be the average price or cost of Connellsville coke during the continuance of the shipments of Fairmont coke.

Q. 248. Have you at any time so stated?

A. I have not used the words "average price."

Q. 249. Did you not ascertain that value of 11½ cents per bushel by a very different process than by taking an average of the whole time during which Fairmont coke was shipped?

A. I have said "the average cost of Connellsville coke" and made no reference to the average time.

Q. 250. Could you state the average cost without reference to some period of time?

A. I think I could.

Q. 251. How?

A. By taking the sum of the amounts paid for the coke at the mines and amounts paid for transportation and dividing by the number of bushels.

Q. 252. What number of bushels?

A. Of the number of bushels bought and transported.

Q. 253. By whom?

A. By the consignee.

131 Q. 254. Could you use any particular number of bushels to divide by without reference to a particular shipment or shipments made at a particular time or times?

A. I don't know.

Q. 255. When you speak of the average cost of an article don't you mean the average cost within some period of time, small or great?

A. I presume so.

Q. 256. And have you not stated a few moments since that 11½ cents was the average cost of Connellsville coke during the continuance of shipments of Fairmont coke?

A. I did.

Q. 257. But did you not state yesterday that 11½ cents per bushel was the cost of Connellsville coke delivered at your furnace during the time that the cost at the mines was 5 cents per bushel?

A. I don't recollect that I did.

Q. 258. Is not that the fact?

A. It depends entirely upon how many bushels are in the car at a given rate of freight.

Q. 259. Take the actual number of bushels and the actual rate of freight and state whether 11½ cents per bushel was not the cost of Connellsville coke delivered at your furnace while it cost 5 cents at the mines, and not while shipments of Fairmont coke continued.

A. I do not know.

Q. 260. Haven't you once made the calculation with the above result?

A. I think I did say that would be a fair valuation, though it was not the result of any special calculation.

Q. 261. A fair valuation during that time, did you say?

A. I think I said when coke was five cents at the mines.

Q. 262. Didn't you ascertain the 11½ cents by adding 5 cents to the cost per bushel for transportation?

A. I do not know.

Q. 263. If 11½ cents is a fair valuation when the cost at the mines was 5 cents, was it a fair valuation during the whole period of shipment of Fairmont coke, when in that period the cost at the mines fell considerably below 5 cents?

A. If 11½ cents is a fair valuation for coke which costs 5 cents at the mines, with a smaller cost at the mines, a smaller valua-
132 tion at the furnace would be a fair valuation, the difference between the cost at the mines at two stated times being added to or deducted from the cost at the furnace.

Q. 264. Then the price of Connellsville coke at the mines during the continuance of shipments of Fairmont coke having fallen below 5 cents, do you still say that during that time you used 1,439,340 bushels of Connellsville coke at 11½ cents per bushel?

A. I think that was what the coke cost. When I spoke of a fair valuation that was approximation.

Q. 265. Did it cost you an average of 11½ cents per bushel during that whole time?

A. I presume that in that estimate bushels of Connellsville coke of 40 pounds were brought to their equivalent bushels of Fairmont coke, though I am not certain that that was done.

Question repeated.

A. I do not know, but presume it did.

Q. 266. Did you not state, in making the estimate to which you referred, that you had not added the one-fortieth to the cost of the Connellsville coke?

A. I do not remember that I did.

Q. 267. Has any part of your testimony been read from a written memorandum prepared before you came here?

A. Yes; portions of my testimony yesterday afternoon were made from notes and memoranda prepared in order to answer the question more intelligently and give figures required.

Q. 268. Will you produce and file those notes and memoranda?

A. I will if desired.

Mr. HUBBARD: Please do so now.

Witness files memoranda, marked Exhibit "O."

133 EXHIBIT "O" OF COMPLAINANTS' DEPOSITION.

Applying Some Methods of Detenum.

DEWEY, VANCE & Co.
vs.
WEST FAIRMONT AND MARION GAS COAL CO. } In Chancery.

The principles above applied to values of Fairmont coke are equally applicable to values of Connellsville coke. I find that our monthly average receipts per car-load for a series of months, commencing with September, 1872, were 547, 583, 595, 586, 610, 612, 600 bushels per car, and the list might be extended further, if desirable. The rate for transportation was $40.00 per car-load, regardless of whether car contained 547 or 612 bushels. The cost at mines was 5 cents per bushel, which, added to cost per bushel for transportation, gives, for a fair valuation, 11.50 cents per bushel Connellsville coke delivered at our furnace. This was the value used in our estimate wherein we claimed damage $15,402.12. It will also be borne in mind that a bushel of Fairmont per contract was 41 and a bushel of Connellsville was 40 pounds; hence for ascertaining difference in values it is admissible to add 1.40 to value of Connellsville to bring it an equivalent to Fairmont bushel.

In my testimony I employ the more direct and easier method of determining value of Connellsville coke by averaging the car-load to consist of 600 bushels, with a charge of $40.00 per car for transportation, or 6⅔ cents per bushel added to cost, 5 cents per bushel at mines, equal to 11⅔ cents per bushel delivered at our furnace. I have not added the 1.40 to cost of Connellsville to reduce to equivalent bushel of Fairmont coke.

In my estimate for the $15,402.12 was made as follows, to wit:

While in my testimony I have only claimed the difference between 11⅔ cents per bushel for Connellsville which was used in lieu of Fairmont, costing 9⅓ or 2⅓ cents per bushel for 436 car-loads, which we claim were not delivered; we find the average all the cars actually delivered to be about 620 bushels, so that 436 cars multiplied by 620 bushels per car equals 270,320 bushels not delivered. This amount multiplied by 2⅓ cents equals $6,307.47.

I think the prices in the $15,402.12 estimate are taken from actual average prices shown by our books, while in my testimony I have only attempted an approximation. I consider either method
134 entirely fair, inasmuch as the difference is conjectural, the coke never having been delivered, but a delivery was contemplated in the contract.

I assume in my testimony that we received 170,743 bushels Fairmont, including the trial lot, and that 49 cars were good coke; 49 multiplied by 620 equals 30,380; 170,383—30,380 equals 140,403 poor coke. If that had been used in proportion one-third Fairmont and two-thirds other coke would have entered into production of 140,403 divided by 30 equals 4,680 tons metal, assuming 3,180 to be white and mottled and at same time weak and deteriorated to extent of 4.00 per ton, equals $12,720.

Assuming 1,500 to be gray and apparently of good quality, but proving by tests to be weak and rotten red short, deteriorated to extent of 2.00 per ton, equals $3,000; adding $12,720 and 3,000 we have $15,720.

Assuming that by irregular working of furnace which tends to produce white and mottled metal there be an actual loss of iron in the slag from the furnace, increased consumption of fuel, reduced daily product metal from furnace and increased fixed expense and labor per ton produced equals about 5 per cent. of average cost, producing ton of iron, which, with labor added, was about $30.00, we have 5 per cent. on $30.00 equals 1.50, multiplied by 3,000 tons white and mottled equals $4,500.

Teste: L. F. STIFEL, N. P.

Q. 269. Why, when you had used and had in your possession this memoranda, upon which is written "The cost at mines was 5 cents per bushel, which, added to cost per bushel for transportation, gives for a fair valuation 11½ cents per bushel," did you, when asked whether you didn't ascertain the 11½ cents by adding 5 cents per bushel to the cost per bushel for transportation, say you didn't know?

A. I supposed you had reference to an exact valuation, and not an approximate one.

Q. 270. Did either your memorandum or my question say anything about exact or approximate?

A. I don't know.

Q. 271. Then why do you now introduce that distinction?

135 A. I don't know.

Q. 272. Did you pay more than a fair valuation for Connellsville coke during the period of shipment of Fairmont coke?

A. We did not buy it at an assumed fair valuation.

Q. 273. At what price did you buy it?

A. At a stated price at the mines.

Q. 274. And did you pay the freight?

A. Yes.

Q. 275. What did the two amount to per bushel from time to time during the continuance of shipments of Fairmont coke?

A. I think that from the commencement of shipments in '72 to July, '73, the price was 5 cents per bushel at the mines, and I think that during July and August, '73, it was 4½; during September and October I think it was 4⅜; during November I think it was 4½. I think the freight was $40 per car of 600 bushels throughout the entire time.

Q. 276. Did you ever calculate the cost per bushel delivered at your furnace when the price was 5 cents at the mines?

A. Yes.

Q. 277. What is the result of the most exact calculation in that matter that you ever made.

A. Based on 600 bushels to the car-load it would be 11⅔ cents per bushel delivered.

Q. 278. Haven't you made a calculation based on the actual number of bushels?

A. I don't remember that I have; if I have I have forgotten the result.

Q. 279. Did you make any calculation that resulted in eleven and one-half cents per bushel while coke was five cents at the mines?

A. I don't know that I made that calculation. I did made the assumption that eleven and one-half cents was a fair valuation, but it was not the result of an exact calculation.

Q. 280. Didn't you base the first item of your estimate of damages on the price of Fairmont coke at 9.22 cents per bushel and Connellsville coke at 11.50 cents per bushel, and didn't you claim as damages the difference between those two sums?

A. I did.

Q. 281. Didn't you calculate an estimate or approximate those two prices on exactly the same principles?

136 A. I don't think that I calculated those values or estimated or approximated those values.

Q. 282. How did you get them?

A. I think those values were given me by our secretary.

Q. 283. With any statement of the method by which they had been arrived at?

A. I think there was a statement.

Q. 284. Was that method the same for both prices?

A. I do not remember.

Q. 285. How, then, did you testify to an estimate of damages based upon them?

A. Because I believe them to be correct and were prepared by the person properly authorized to attend to that kind of work.

Q. 286. Did you understand when you testified respecting those prices the methods by which they had been arrived at?

WITNESS: I would like to ask Mr. Hubbard what prices you refer to. I am not entirely clear that I understand the line of your question.

Mr. HUBBARD: The only prices that have lately been mentioned—9.22 for Fairmont and 11.50 for Connellsville coke.

A. I did know the method about the time that the calculations were made, about a couple of years ago, when I testified I don't know that I remembered or do I know that I thought of the method. I believe them to be correct.

Q. 287. Do you believe them to have been arrived at in the same method?

A. I do not know. I do not remember.

Q. 288. If they were not would any testimony as to damages based on a comparison of those prices be fair and just?

A. I do not know.

Q. 289. Would you be willing to give such testimony?

A. I do not know.

Q. 290. Have you done so?

A. I presume I have, in the answer to the preceding question.

Q. 291. How does your saying that you do not know whether you would be willing to give such testimony answer the question whether you have given such testimony?

WITNESS: Please state what you mean by such testimony.

Mr. HUBBARD: Testimony based on a comparison of prices which have not been estimated in the same manner.

137 A. I don't know that it does answer it and I don't know of any reply that would answer it. I am willing to answer any question which admits of an answer if I am capable of giving it.

Q. 292. Then I ask, Have you testified to damages based on a comparison of prices which were not estimated in the same manner?

A. I do not remember how the estimates were made resulting in giving the prices; consequently cannot say whether I have or not.

Q. 293. If you do not know whether the prices you have compared were ascertained or estimated in the same manner, do you regard your testimony as to damages based on such a comparison as fair and just?

A. When the knowledge was fresh and clear in my mind as to how the prices were made I evidently was satisfied that there was no injustice in the claim for damages based upon those prices. I now know no reason to change my mind.

Q. 294. Could you have been so satisfied unless you understood, when the knowledge was fresh and clear that the respective prices had been arrived at in the same way?

A. I don't think I could.

Q. Then on the assumption that the——

WITNESS (interrupts and says): I would like to add to that answer if you have no objection. (Witness asks question just answered to be read, which was done.) Provided it were possible and just to apply the same methods in determining the two prices.

Q. 295. Is there any impossibility or injustice about applying the same methods to determine these two prices?

A. I can conceive the existence of such a possibility; for instance, a car-load of Fairmont and a car-load of Connellsville coke be shipped at the same time, on one a rate for transportation is paid $20 per car-load in one case, and $40 per car-load in the other case, one car-load may contain 625 bushels of coke, the other car-load may contain 550, or any less amount than 625, and injustice might be wrought by dividing the cost of transportation in both cases by the same division, whether it be 550, the smaller amount, or 625, the larger amount.

Q. 296. But would any injustice be done by dividing in the one case by 550 and in the other by 625, and in such a division, while the divisions would be different, would not the method be the same?

138 A. I presume there would be no injustice in such a division. While the divisors would be different the method would be the same.

Q. 297. Then, on the assumption that the prices 11.50 and 9.22 had been arrived at in the same way, the price of 11.50 being with reference to the time when coke cost five cents at the mines, ought not the 11.50 be reduced when the comparison extends to a time when Connellsville coke had fallen below five cents at the mines?

A. Upon those assumptions I think the deduction would be correct.

Q. 298. Is not, then, your estimate of damages erroneous in that it extends the valuation of 11.50 for Connellsville coke over a time when that coke had fallen below five cents at the mines?

A. I suppose that would be so, but applying the deductions in the previous question to a large portion of the Connellsville coke, which cost considerably over twelve cents per bushel, it might result in an injustice to reduce it below 11½.

Q. 299. When did Connellsville coke cost you over twelve cents per bushel?

A. If the notary will refer to my testimony yesterday he will find a statement of a certain number of car-loads of Connellsville coke received by us during the months of September and October, 1872, and one which the rate of freight was $40 per car. Without having made the exact calculations I think that during one, or perhaps both, of these months, if the average number of bushels per car-load be divided into the rate of $40 per car and the quotient added to five cents per bushel at the mines, the result will show coke costing us over twelve cents per bushel at the furnace.

Q. 300. And couldn't you pick out particular times when Fairmont coke cost you at the furnace over ten cents per bushel?

A. I don't think I could. I don't think that Fairmont coke ever cost us as much as ten cents per bushel at our furnace. My testimony yesterday will show the average number of bushels per car-load received during each month, and still I have not made the exact calculations. I do not think that by dividing the $20 per car, freight, by the average number of bushels per car during any one month that would be equal to as much as four cents. It would
139 necessarily be four cents to add to six cents, the price at the mines, to make the delivery price equal to ten cents.

Q. 301. Don't you suppose your secretary took into consideration what your Connellsville coke cost in September and October, '72, when he made the estimate of its cost for the purpose of comparing that cost with the cost of Fairmont coke delivered at the same time?

A. I suppose that he took into consideration the average cost of all Connellsville coke delivered during September, October, November, and December, 1872, and January, February, and March, July, August, September, October, and November, 1873, and applied the same principles to Fairmont coke, though I do not remember just how the calculations were made.

Q. 302. But have you not testified that the valuation of 11.50 was made for the period when Connellsville coke was five cents per bushel at the mines?

A. I remember my making the assumption that 11½ cents would be a fair valuation with Connellsville coke five cents at the mines, but I do not remember testifying that I had calculated the price or that the price, 11½, in the estimate was calculated with coke at five cents at Connellsville.

Question repeated.

A. I do not remember whether I did or not.

Q. 303. Is not that the fact?

WITNESS: I do not know that I did.

Mr. HUBBARD: I am not now asking what you said, but whether it is not the fact?

WITNESS: You better make your question a little more explicit, Mr. Hubbard.

Q. 304. Was not the 11.50, whether you call it estimate, assumption, calculation, or exact price, arrived at with reference to the period when Connellsville coke was five cents at the mines?

A. The 11.50, as an assumption by me, was arrived at with Connellsville coke five cents at the mines, but as an estimate, calculation, or exact price I do not know whether the 11½ cents per bushel was based on five cents at the mines.

Q. 305. Haven't you said that you got the 11.50 from the secretary?

A. I did.

Q. 306. Why, then, do you call it an assumption by you?

A. That is not the price I refer to as an assumption; that is not the statement of the price that I refer to as an assumption.

140 Q. 307. What statement do you refer to as an assumption?

A. The statement referred to this afternoon as occurring in my testimony of yesterday, wherein I said that 11½ cents was a fair valuation of Connellsville coke at 5 cents at the mines.

Q. 308. Were the months of September and October, 1872, within the period when Connellsville coke was five cents at the mines?

A. They were.

Q. 309. Were not the months of August, September, October, and November, '73, without that period?

A. I think they were without that period.

Q. 310. Do you still say that during the continuance of shipments of Fairmont coke you used 1,439,340 bushels Connellsville coke at 11½ cents per bushel?

A. I think that was the statement given me by our secretary, and I think it was correct.

Q. 311. From any knowledge of your own or simply from his statement?

A. He was the party authorized to prepare those things, and from my own knowledge — believed them at the time they — prepared to be correct. I have no reason since to change my mind.

Q. 312. Why wasn't he also authorized to testify to the statement he was authorized to prepare?

A. I do not know.

Q. 313. Do not your books show to the cent the amount your firm paid for that Connellsville coke?

A. I presume they do.

Q. 314. Did you in the careful examination of the books made for the preparation of your present estimate look to see what that amount was?

A. I don't remember that I did.

Q. 315. Why didn't you do that instead of assuming the amount to be $165,521.10 when you expected to testify under oath respecting this first item of damages you claim?

A. I did assist in that estimate to a sufficient extent to satisfy me of its accuracy and my entire willingness to make oath to it.

Q. 316. Is it accurate?

A. I think it is.

Q. 317. Will you look at your books, which you say state accurately the amount, and see whether your statement is accurate?

141 A. I will do so, and cheerfully make a correction if I find it necessary to do so.

Q. 318. If an account exists in your possession which may necessitate a correction of your testimony, why didn't you look at it before you made the statement which is subject to that possible correction?

WITNESS: What statement have you reference to, Mr. Hubbard. The statement which—I would like you to read that question. I don't understand the exact drift of the question.

Question repeated.

A. I don't know.

Q. 319. Why have you testified upon assumptions instead of upon facts accurately stated by your books?

A. I am not aware that I have done so upon facts which are contained in our books.

Q. 320. Don't they contain the exact cost of Connellsville coke for the period in question?

A. I presume they do.

Q. 321. Haven't you assumed that cost instead of getting it from the books?

A. I have already stated that I do not remember the method of obtaining that price, though I believed it at the time to be correct.

Q. 322. Haven't you already stated several times that you assumed that price to be as you stated?

A. No; not where the price is used in the plea. I stated awhile ago that it might have been assumed (though I cannot say positively that it was done); that in obtaining the price of 11½, in the plea covering the entire time of shipment of Fairmont coke, one-fortieth may have been added to the cost of Connellsville coke to bring it to an equivalent of one bushel of 41 pounds of Fairmont coke. I repeat that I do not believe, nor have I said, that the price of 11½ cents for Connellsville coke used in the plea, or any part of that price, was based upon assumption, with the exception of the one-fortieth above noted, and I am not sure that that was added.

Q. 323. Without reference as to whether the price was used in the plea or not, haven't you stated several times that you assumed that price to be as you stated?

A. I do not remember whether I did or did not.

Adjourned to June 27th, 1879, on which day (Friday) the cross-examination of the witness, FRANK J. HEARNE, was resumed as follows:

142 The witness, Mr. FRANK J. HEARNE, before the cross-examination was resumed, made the following statement:

WITNESS: "I desire to make a correction concerning the statement of price paid for Connellsville coke at the mines during the month of November, 1873. This statement was made by me yesterday from memory; this price should have been 3¾ cents per bushel at the mines. 'Exhibit O,' which was yesterday filed, was prepared by me under the following circumstances, while answering the question, 'What change or modifications of the data at your command have occured?' We adjourned for dinner at 12.30 o'clock; after eating my dinner I prepared this paper and read from it the concluding portion of the answer when we convened at 2 o'clock. This paper was prepared in order to more intelligently answer the question and save time in making answer, the answer being largely made up of figures and calculations, which would have been very tedious to give from dictation. I now produce and file another paper, marked 'Exhibit N,' which I used in making that answer. I also produce and file a statement of coke shipped to our firm by the West Fairmont Gas Coal Company, marked 'Exhibit M,' and a statement of Connellsville coke shipped to our firm by sundry parties. marked 'Exhibit L.' 'Exhibit M' shows the actual receipts of Fairmont coke received from October 1, 1872, to November 21, 1873, total of 246 cars, for which $20.00 per car was paid for transportation. This paper shows the average cost of Fairmont coke received at our furnace to have been 9.22 cents per bushel of 41 pounds. 'Exhibit L' shows the actual receipts of Connellsville coke during the above period, and with the prices extended as actually paid at the mines, and also the total frieghts paid on the 2,316 car-loads, making the average cost of Connellsville coke to have been 11.20 cents per bushel of 40 pounds. But for purposes of comparison with Fairmont coke of 41 pounds per bushel it is necessary to add $\frac{1}{10}$ giving total average cost per bushel of 41 pounds of Connellsville coke to be 11.48 cents.

EXHIBIT "N."

Statement of damages and losses sustained by Dewey, Vance & Co. by reason of failure of the West Fairmont Gas and Coal Co. to deliver a quality of coke equal to their sample shipments, during month of September, 1872, and in comformity with spirit of agreement entered into by them.

143 From October 6, 1872, to November 30, 1873, — was used 1,592,028 bushels coke, making 17,832 tons pig iron.

The West Fairmont cost, delivered, 9.22 cents per bushel.

The Connelsville cost, delivered, 11½ cents per bushel.

We actually used during continuance of shipment of West Fairmont coke in making the iron above named:

1,439,340 bushels Connellsville coke at 11.50 cents	$165,524 10
152,688 bushels West Fairmont coke at 9.22 cents	14,077 83
1,592,028 bushels of coke costing, in aggregate	179,601 93

If the West Fairmont Gas and Coal Company had not supplied an inferior article, but had furnished coke equal in quality to that shipped during month of September, 1872, we could and would have used one-third of the entire quantity of West Fairmont coke.

There would have been used in making the above iron—

1,061,352 bushels Connellsville coke at 11.50 cents	$122,055 48
530,676 bushels West Fairmont coke at 9.22 cents	48,928 33
1,592,028 bushels, which should have cost	170,983 81
Resulting in subjecting us to a loss of	$8,618 12

And, furthermore, while using the above coke in varying proportions, we were subjected to further damage and loss by deterioration of quality of pig iron and loss and waste of stock by reason of bad working of the furnace, equal to $4.00 per ton on a quantity of metal equal to the amount which the West Fairmont coke actually used would have produced if used without admixture with other and better coke.

The amount of West Fairmont used, 152,688 bushels, would have produced 1,696 tons pig iron at $4.00 per ton loss	6,784 00
Total damage and loss from West Fairmont coke	$15,402 12

EXHIBIT "M."

Statement of Coke Shipped to Dewey, Vance & Co. by West Fairmont Gas Coal Co.

	Cars.	Bushels, 41 lbs. at 6 c.	
1872.			
October	62	37,996	
November	29	17,990	
December	17	10,812	
1873.			
January	5	3,185	
February	19	11,576	
March	26	16,247	
August	24	15,234	
September	18	11,024	
October	26	16,674	
November 21	20	11,950	
	246	152,688	$9,161 28
Freight on 246 cars at $20.00			4,920 00
Totat cost, average per bushel 9.22 cents			$14,081 28

144 EXHIBIT "L."

Statement of Connellsville Coke Shipped to Dewey, Vance & Co. by Sundry Parties.

	Cars.	Bushels, 40 lbs.			
1872.					
October	150	87,514 at 5c.	$4,375	90	
November	211	125,440 "	6,272	00	
December	229	135,244 "	6,762	20	
1873.					
January	315	192,229 "	9,611	45	
February	187	114,485 "	5,724	25	
March	128	76,631½ "	3,831	58	
April	6	1,830 "	91	50	
July	182	116,070 at 4½c.	4,932	97	
August	214	133,557½ "	6,010	09	
September	280	171,200 at 4⅝c.	7,490	00	
October	232	148,500 "	6,496	88	
November 21	182	114,070 at 3¾c.	4,277	62	
	2,316	1,416,771	65,876	44	65,876 44
Freight was paid—	17 cars @ $33.34		566	78	
	2,299 cars @ 40.00		91,960	00	
					92,526 78
Average per bushel 11.20c					158,403 22
Cost per bushel, as above			11	20	
Add to make equivalent Fairmont 1.40				28	
					11 48
2,316 cars—1,416,771 bushels at 5c					$70,838 55
Freight, as above					92,526 78
Average, 11.53 per bushel					163,365 33

Q. 324. Was not, then, the estimate in your testimony as to the first item of damages erroneous?

A. It was only claimed to be approximate.

Q. 325. Is the rest of your testimony only claimed to be approximate?

A. It is necessarily to a large extent approximate.

Q. 326. Why did you not say it was approximate when you gave the testimony?

A. An examination of the testimony will, I think, show that I have already said so.

Q. 327. Didn't you testify, in chief, "We actually and during the continuance of shipments of Fairmont coke used 1.439,340 bushels Connellsville coke at 11½ cents per bushel, equal to $165,521.10;

145 152,688 bushels of Fairmont coke at 9.22 cents per bushel, equal to $14,077.83, or a total of 1,592,028 bushels of coke costing,

in the aggregate, $179,601.93," and again, "the same quantity of coke as above did actually cost us $179,601.93," and did you, in your examination-in-chief, say anything to indicate that those amounts were approximations?

WITNESS: What do you mean by examination-in-chief, Mr. Hubbard?

Mr. HUBBARD: The examination before I began to examine you.

A. No, sir; I do not think I did so testify.

Q. 328. Did you not testify that the total quantity of coke used by you during that period did actually cost you $179,601.93?

Objected to by Mr. W. Hearne on the grounds that it does not fix the time, does not state what period it refers to, and tending to mislead the witness.

Mr. HUBBARD: That period means the period designated in the last preceding question, to wit, during the continuance of shipments of Fairmont coke.

A. I did not so testify on the direct examination.

Q. 329. Did you on the cross-examination?

A. No, sir; but I gave those figures as having formed part of the estimate upon which the $15,402 plea was based. The testimony was not given as my present opinion of the extent of the damages.

Q. 330. Is it your opinion, then, that the damages under this item do not amount to $8,618.12?

A. It is my opinion that they amount to very nearly that sum, if not exactly; I am not prepared to say that that should be the exact amount.

Q. 331. What amount are you prepared to state as the damages under the first item?

A. I am not prepared to state the exact amount; I think that sum would be a very close approximation.

Q. 332. By what method do you arrive at it?

A. My own opinion of damages, I think, would be most fairly arrived at by the method set forth in my direct examination. While I consider the above-named sum a very close approximation to our damage, based on the method of calculation adopted in Exhibit "N," I prefer to claim, believing it more easily proved and involving fewer figures, a sum represented by the difference in the values of Connellsville coke which was used in lieu of the 436 carloads of Fairmont coke which the West Fairmont Gas Coal Company failed to deliver.

146 Q. 333. What was the result in amount, of your opinion, as testified to?

Objected to by Mr. W. Hearne as incompetent on the ground as asking the witness for his opinion.

A. My testimony-in-chief will show the amount; I do not recall it exactly, but it was an approximation based on cost of Connellsville coke at the mines, with forty dollars per car of six hundred bushels added, making the cost of the coke eleven and two-thirds cents per bushel, delivered; Fairmont coke, six cents at the mines,

with twenty dollars per car of six hundred bushels, for transportation, making the cost, delivered, nine and one-third cents, or a difference of two and one-third cents per bushel; this difference of two and one-third cents applied on the amount of coke represented by 436 car-loads of 620 bushels per car; the resulting sum I do not know.

Q. 334. Wasn't the amount of the result $6,307.47?

A. I think, perhaps, that was the amount.

Q. 335. Do you consider that a close approximation to $8,618.12?

A. No; I would not call that a close approximation.

Q. 336. Doesn't Exhibit "N," to which you have referred, show that $179,601.93 is taken as the cost of all kinds of coke delivered during the continuance of shipments of Fairmont coke?

A. I believe it does.

Q. 337. Was not that amount mentioned in your testimony?

A. I do not think it was in my testimony-in-chief.

Q. 338. In any part of your testimony?

A. On cross-examination it was read from Exhibit "N."

Q. 339. Did you read it or state it as an assumption, approximation, or a fact?

A. I do not remember that I did either; it was given as part of the method in reaching the $15,402.12 result; afterward I stated, I believe, that I thought that result to be correct.

Q. 340. Isn't $179,601.93 incorrect?

A. Since preparing Exhibit "L" I do not think it is exactly correct, though nearly so.

Q. 341. How near?

A. I think that if the price given for Connellsville coke is retained the amount of Connellsville ought to be reduced 1.40 to reduce it to equivalent bushels of Fairmont coke; I cannot tell what difference that would make.

147 Q. 342. Why, what has that to do with the actual amount of dollars and cents paid by you?

A. I don't know.

Q. 343. Then why do you mention it when asked how near $179,601.93 is to the amount actually paid?

A. I had no good reason for it.

Q. 344. Then I ask again how near $179,601.93 is to being correct.

A. I do not know.

Q. 345. Don't your books show?

A. Our books contain no such entry as that that I am aware of.

Q. 346. Don't they contain entries showing that that is incorrect and the extent to which that is incorrect?

A. I don't know that they do.

Q. 347. Will you ascertain and make further answer, to that question?

A. It is unnecessary to make further answer, for I can say that no such entries appear upon our books; the amount was evidently made from estimates, the data of which were taken, I suppose, from our books. I do not know that I prepared that amount; I believe those

amounts to be as near correct as they can be made, with the exception noted above.

Q. 348. Didn't Exhibits "L" and "M" show the total cost of coke during the period of shipments of Fairmont coke to have been $172,484.50?

A. Yes; that is the cost valuation of the coke delivered.

Q. 349. Wasn't it the actual amount paid for the coke?

A. In the sense that any amounts paid for interest on coke settlements did not constitute a part of the cost of the coke it was.

Q. 350. What amounts were paid for interest on coke settlements, and what do you mean by that expression?

A. I can't tell what amounts. I mean by that expression any amounts paid for interest on coke settlements which would make it appear in our full account that the coke had cost more than the contract price. Statement "L" is based upon the exact receipts of Connellsville coke during a certain period, and the extensions made are the contract prices during that period.

Q. 351. Didn't you buy all this coke on 60 or 90 days' time without interest?

A. I believe so, though I do not remember.

Q. 352. Are Exhibits "L" and "M" made from entries on your books of account?

148 A. As to quantities, yes; the prices are taken from the contracts and the amounts extended as the result of calculation.

Q. 353. Don't your books show the amounts of money paid by you for coke?

A. I do not know; I do not have charge of our books.

Q. 354. Will you ascertain, and if they do show such amounts will you state them as they appear for the time during which Fairmont coke was shipped to you?

A. I will try to ascertain, and I will state them if I so find.

Q. 355. Does not Exhibit "N" show the method by which your firm ascertained the amount sworn to in the bill?

A. I think it does.

Q. 356. You say in your cross-examination, "There would have been used in making the above iron as follows: 1,061,352 bushels Connellsville coke at 11½ cents per bushel, equal to $122,055.48; 530,676 bushels Fairmont coke at 9.22 cents per bushel, equal," &c. Why do you assume that quantity of Fairmont coke?

A. That was not my testimony. That was read from the statement marked Exhibit "N;" it was intended to represent, and was so stated in the exhibit, that the 530,676 bushels was equal to one-third of the entire quantity of coke consumed in our blast furnace from October 6, 1872, to November 30, 1873. In other words, it is one-third of 1,592,028 bushels.

Q. 357. How much coke were you entitled to under your contract with the West Fairmont Gas Coal Company?

(Objected to because the contract is the best evidence.)

A. I cannot answer further than what is shown by the contract. I don't think it has ever been determined under that instrument how much we were entitled to.

Q. 358. Didn't you receive 246 car-loads under it?

A. We received 246 car-loads, more or less.

Q. 359. Don't you claim in the bill and in your testimony that you were entitled to 436 cars more?

A. I claimed that in my testimony, but I am not familiar with what the bill claims.

Q. 360. Don't that make 682 cars which you claim under the contract?

A. I think that's correct, though the statement "M" shows that our receipts were 246 cars from the first of October. While I think the contract was signed on the 4th of October, I think there were four cars delivered during October and prior to signing the contract, which should properly be deducted from the
149 246; hence my answer, 246 cars, more or less. I don't know that any one has insisted on this difference of four cars making any material difference.

Q. 361. Wasn't the average contents of a car 620 bushels?

A. I think that was about the average.

Q. 362. Wouldn't the contents of the six hundred and eighty-two cars then, being all that you were entitled to under the contract, be 422,840 bushels?

A. Six hundred and eighty-two car-loads multiplied by six hundred and twenty bushels is equal to 422,840.

Q. 363. Why, then, does your testimony or your estimate or Exhibit "N," in estimating damages under the first item, assume that if the Fairmont Company had complied with its contract you would have consumed 530,676 bushels of Fairmont coke?

A. Because there was a legal question involved in the operations and the extension of time of the delivery under the contract I cannot answer.

Q. 364. Did any one ever suggest the possibility, whether upon a legal question or not, that you were entitled to more than 422,840 bushels?

A. I think I have heard the suggestion.

Q. 365. How much was it suggested you might be entitled to and who made the suggestion?

A. A continuance of shipment of three cars daily; I do not remember who made the suggestion.

Q. 366. Do you still think it was a fair method of calculation to estimate damages on the theory that you would have consumed 530,676 bushels of Fairmont coke if the Fairmont Company had complied with its contract?

A. No; for if they had complied with their contract it would have required a new contract to secure the additional amount of coke.

Q. 337. Don't the difference between 530,776 bushels and 422,840 bushels make a reduction of about $2,300 in the $8,618 sworn to in the bill as the first item of damages?

A. The calculation is, I presume, approximately correct.

Q. 338. Do you still consider either method of calculation or approximation entirely fair?

A. I consider the methods fair for either the $8,618 or $6,307; but the first method is, of course, contingent upon the ques-
150 tion of liability on the part of the West Fairmont Gas Coal Company to deliver coke to the full amount of 530,676 bushels.

Q. 339. As the results of the calculations made by you in your cross-examination you said you had eleven different values for Fairmont coke. Which of them did you use in your estimate of damages?

A. I stated in that testimony, and immediately following the statement above referred to, that 9.22 (the mean of these eleven averages) was used in the $8,618 estimate, while nine and one-third cents, the average of a six-hundred-bushel car-load, was used throughout my testimony-in-chief.

Q. 340. Did you say, then, that 9.22 was the mean of those averages, and is any such expression to be found in your testimony as written by the notary and at which you looked just before answering the last question?

A. No; my meaning was that the two prices referred to occurred in the testimony at that place, and all else said was explanatory and disconnected from the report of the testimony.

Q. 341. In your estimate of damages on account of deterioration of iron why do you assume 3,180 tons was white and mottled?

A. Because that is the best of my recollection and judgment, and is an approximation or assumption based on that judgment.

Q. 342. Haven't you a record showing the exact amounts of white and mottled iron made while you were using Fairmont coke?

A. Yes, and I now produce and file it.

Witness produced and filed two records, marked, respectively, Exhibits "K" and "J."

Q. 343. Don't you think it would have been fairer and juster for you to have referred to that record before testifying instead of making assumptions respecting the things it accurately shows?

A. I do not know.

Q. 344. Why is it that in several instances you have chosen to testify on assumptions and approximations instead of accurate statements which were at your hands?

A. I am not aware that I have done so.

(Witness here refers to the deposition—*i. e.*, to his examination-in-chief.)

Q. 345. Didn't you assume the cost of coke when you had the means of accurate information, and didn't you assume the
151 quantity of mottled iron when you had an accurate record of its production?

A. I did make the approximation on the values of coke, which I considered perfectly fair, in the comparison of the two kinds of coke, and stated at the time that it was an approximation. I desire to state, concerning the production of iron, that I find that in the testimony-in-chief it does not express exactly my true meaning, though

perhaps as it was expressed orally at the time. My estimates for the production of pig iron should have been based upon what would have been the qualities of iron had the Fairmont coke been used in the proportion of one-third. I have not examined the testimony excepting at one point, being the first half of page 53, and it is so inconsistent with my true meaning, and I think my expressed meaning, either before or after on the direct examination, that I would like to have that portion changed or explain. Beginning of page 53 ,in giving the second item of damage, I am made to say: "Second, for deterioration in quality of pig iron made, in which 140,400 bushels of coke were used in the mixture at an average rate, say, of one-third or thirty bushels per ton, would be 4,680 tons; about 1,500 tons of this were gray, but weak and rotten red short, and was depreciated to the extent of $2.00 per ton. The remaining 3,180, being white and mottled as well as weak and rotten red short, was depreciated to the extent of $4.00 per ton, or total for the depreciation of quality of pig iron, $15,720." I intended to convey as my true meaning what would have occurred had the 140,400 bushels of coke been used in the proportion of one-third, and that we suffered all these evil results in a modified form distributed over a larger production of iron with a smaller percentage of Fairmont coke used. I find upon looking further down page 53 and turning to page 54 that the inconsistency referred to is largely explained.

Q. 346. Did you intend, then, to testify what the damages would have been if something had happened which didn't happen instead of testifying what the damages really were?

A. The coke was actually used in the proportion of one-third and actual damage incurred, equivalent to a certain rate per ton, and was carried sufficiently far to satisfy us what would be the result of its further use at the same rate.

Q. 347. Can't you answer the last question, yes or no?

A. I don't know, because I haven't made up mind yet whether I can or not (that was a side remark, not meant for the notary; "I don't know" was the answer to the question).

152 Q. 348. Were not your answers in your examination-in-chief read over after they were written, and did you not make such corrections and explanations as you desired?

A. I think they were read over; but it is possible that the change of a tense or mood of a verb could escape my correction.

Q. 349. Didn't you in your cross-examination assume the quantity of white iron made when you had at hand an accurate record of the amount produced?

A. No; I had no such record of white iron made under the conditions mentioned in my cross-examination.

Adjourned to June 30th, 1879, on which day the cross-examination of the witness, F. J. HEARNE, was resumed as follows:

Q. 350. Didn't your furnace make white and mottled iron at other times than when you were using Fairmont coke?

A. Yes.

Q. 351. What proportion of the average production of the furnace at other times was iron of that description?

A. I do not remember.

Q. 352. Why, then, do you consider the production of white and mottled iron during your use of Fairmont coke as wholly chargeable to that coke?

A. Prior to the 15th of September, '72, we were unfortunate enough to be the victims of an incompetent founder. On that date we employed a thoroughly competent man, who improved upon the practice of the former founder and got the furnace into good working condition. This was while using the trial lot of Fairmont coke and the first few car-loads under the contract. The furnace, about the middle or latter part of October, began working irregularly again, as we think, from the effects of Fairmont coke; working so badly, in fact, that we were compelled to suspend operations for several days and make extensive repairs upon the furnace. Resuming operations after the stoppage, the furnace still continued to work very irregularly and making inferior iron as she had done before the stoppage. My father then visited Fairmont and made the discovery (Mr. Hubbard here objects to any statements of the witness not of his own knowledge) that the West Fairmont Gas Coal Company were manufacturing their coke from dirty refuse slack, which at once accounted for the inferior quality of the coke and the bad working of the furnace and the inferior quality of the iron. I think
153 that we then discontinued the use of the coke and the furnace showed very considerable improvement in quantity and quality of product and regularity of the smelting operations. There existed in our minds no doubts as to the cause of the production of so large a proportion of white and mottled iron and poor quality gray iron.

Q. 353. If, when you were using Connellsville coke alone, your furnace made white iron, why do you in comparing Fairmont and Connellsville for the purpose of estimating damages assume that all the white iron made is chargeable to Fairmont coke?

A. I have made no such charge.

Q. 354. Do you say that any of the white iron made while using the Fairmont coke is attributable to that coke?

A. I do.

Q. 355. What proportion of it?

A. That would depend largely on the amount of Fairmont coke in our mixture at the time it was made; it would be impossible for me to tell at this time the amount of white and mottled iron which was actually made by reason of the Fairmont coke. I have given it as my best judgment, based on the operations of the furnace and the qualities of iron made, what would have been the results if the Fairmont coke had all been used in the proportion of one-third; to have complied with the terms of our contract would have demanded a consumption of the coke in the proportion of about one-third Fairmont.

Q. 356. Could your furnace have used three cars a day or at that rate of Fairmont coke from the time of the contract up to the first of July, '73?

A. We could not have used the coke at that rate up to the 1st of July for the reason that we were out of blast a little over two months during that time, or had the cake been equal in quality of the sample lot we could have used more than one-third, had the Fairmont people been able to make the delivery that fast, and the entire amount could then have been used within the time specified, or had the quality of the coke been good we might have arranged for payment for the entire amount contemplated or have the delivery deferred.

Q. 357. If you could not have consumed the coke in the time mentioned in the proportion of one-third Fairmont, why do you assume such a consumption for the purpose of estimating damages?

Objected to as being obscure in its meaning and tending to mislead.

154 A. That rate of consumption was contemplated in our contract based on the results of the trial lot; the amount of damages are assumed upon that rate of consumption for the amount of inferior coke which we did use and not for the amount of coke which was not delivered. The above refers to the claim for damages on account of inferior iron produced.

Q. 358. Can you approximate the proportion of white and mottled iron made while you used Fairmont coke which should be attributed to that coke?

A. In the absence of data I am compelled to approximate with my own judgment as a guide.

Q. 359. Please approximate with that guide.

A. That was done in my testimony-in-chief.

Q. 360. What was the proportion as you then approximated it?

A. With a consumption of one-third Fairmont coke, such as was delivered on our contract, I estimated that about two-thirds of the product be white and mottled.

Q. 361. What proportion did you then estimate should be attributed to the Fairmont coke of the white and mottled iron made while you used that coke?

A. I did not make any estimate on that point.

Q. 362. Then please make it now.

A. It would be impossible for me to make that estimate, because the greater part of the coke was used in varying proportions less than one-third.

Q. 363. How, then, can you make any proper estimate of damages actually suffered in the deterioration of iron by the use of Fairmont coke?

A. Knowing that one-third of the inferior coke would produce white and mottled iron with some gray iron, but weak and rotten red short, we consider that the deterioration existed in the iron in a reduced amount or in direct proportion as we reduced the amount of inferior Fairmont coke in our mixture.

Q. 364. Do you mean that if when one-third Fairmont coke was used two-thirds of the iron would be white; when one-sixth Fairmont coke was used one-third of the iron would be white?

A. No; I mean that the damage to the white and mottled iron was not entirely due to the fact that it was white and mottled; it was depreciated by the presence of sulphur and was inferior white and mottled iron. I pretend to say that with a consumption of one-sixth Fairmont coke the impurities in the iron, due to the
155 coke, were reduced one-half, but entered into a double amount of iron that they would if using one-third.

Q. 365. Did your furnace make any white and mottled iron after you got the competent founder and when you were not using Fairmont coke?

A. Yes.

Q. 366. Did you assume the white and mottled iron you made while using Fairmont coke to be 3,180 tons?

A. No; I assumed that would have been the result had the coke all been used in that proportion.

Q. 367. Did you also assume that if a smaller proportion of coke was used a larger quantity of iron would be white and mottled?

A. No.

Q. 368. Did you actually make 3,180 tons of white and mottled iron while you were using Fairmont coke?

A. I do not know.

Q. 369. Will you ascertain and make further answer?

A. The records have been filed here and are not now in my posession.

(Notary here handed witness the records.)

Q. 370. Are they not now handed you by the notary?

A. They are.

Q. 371. Will you ascertain the facts above inquired about and answer further respecting them?

A. I will endeavor to.

WITNESS: I would like for Mr. Hubbard to say just what he wants me to do with this record.

Mr. HUBBARD: To ascertain whether you actually made during the time you used Fairmont coke 3,180 tons white and mottled iron?

Q. 372. Did you, while using Fairmont coke, actually make 3,180 tons of iron which was deteriorated $4.00 per ton and 1,500 tons which was deteriorated $2.00 per ton?

A. No; but I think the aggregate of our damage arising from that source will aggregate the amount given by that method of estimation. Those figures, of course, are assumed as to tons of iron.

Q. 373. Will you state any facts within your knowledge, and not assumptions, on which you base any testimony as to damages on account of deterioration of iron?

A. We have no record showing the actual rate of consump-

tion of Fairmont coke, and rely upon our recollection of the
156 facts. We know that during the fall and winter of '72 we made quantities of inferior iron from the use of Fairmont coke. We have no records showing quantities. We varied the proportions from time to time, endeavoring at all times to reduce the cost of our iron by using as large an amount of Fairmont coke as possible, and, at the same time, sending iron to our mill from the furnace with the maximum amount of impurities contained therein. This iron was a source of continual anxiety and required extraordinary care and diligence and admixture with better qualities of iron in order to avoid the consequences to be feared in our finished iron; consequently that might have resulted in much heavier damage than we now claim. This represents the conditions during the summer and fall of 1872.

Q. 374. Do you consider what might have occurred to be a fact?

A. I consider the anxiety and the measures adopted to prevent occurrences to be facts, although the occurrences themselves may not be facts.

(The answer objected to as not being responsive and question repeated.)

A. Stated as a principle, I do not.

Q. 375. Then are the matters stated in your last answer but one, excepting "what might have occurred," the facts on which you undertake to say that your damages by deterioration of iron were 15,720?

A. I believe the matter of damage to be a fact, but the method of arriving at the amount necessarily assumption, in the absence of exact records, which ought to have been made at the time of the occurrences mentioned.

Q. 376. If there are any other facts within your knowledge bearing on the question of the amount of damages from deterioration of iron, please state them now, that we may be able to distinguish the facts from your assumptions.

A. I recall a sale of gray forge iron made during the winter of 1872 and 1873, between the 5th and 15th of January, '73, a partial delivery of which was made and was rejected. We were compelled to haul back again to our mill 127 tons 304 pounds; this iron was gray, but weak, and we were compelled to mix strong irons with it and work it in our mill. We tried several times while using Fairmont coke to make a particular grade of iron called "gray neutral" for conversion into bar
iron. These efforts were failures. I remember, particularly,
157 during the month of August, '73, of a failure of this kind whereby we were compelled to discontinue entirely the use of Fairmont coke and substitute for it Connellsville coke before we were able to produce a desired quality of iron. While making this effort to produce a desired quality of iron with the Fairmont coke we produced several hundred tons, perhaps four or five hundred, which was entirely worthless for the purpose intended, and more depreciated than if it had all been white and mottled. This iron was left at our mill several years before we were finally able to dispose of it

without incurring very excessive loss. It was very difficult or impossible for us in this connection to recite particulars, as I have already said; we have preserved no records or data and must rely upon memory.

Q. 377. Do you know any other facts bearing on the deterioration of iron?

A. I do not recall any at present.

Q. 378. Was the sale of iron you have mentioned the one which you have mentioned before as having been made to the Wheeling Iron & Nail Company, and which you then supposed to have been made in the fall of 1872?

A. It was the iron which I testified I thought was delivered during November or December of '72, and which I promised to ascertain the amount. This amount I have ascertained to be 127 tons 304 pounds, and the time, as near as I can ascertain (and it is within a day or two of it), was from the 9th to the 15th of January, 1873.

Q. 379. Was any Fairmont coke used in producing that iron?

A. I think there was, though I have no record of the amount.

Q. 380. If any was used, how long before the iron came out of the furnace must the coke have gone into it?

A. At the rate the furnace was running at that time, a little less than two days.

Q. 381. And how long was it after the coke was received from the railroad that it was put in the furnace?

A. That would depend entirely upon where the coke was unloaded, but in all probability in about twelve hours.

Q. 382. Did you receive any Fairmont coke in December, 1872?

Witness here refers to Exhibit "M."

A. Yes; seventeen car-loads.

Q. 383. On what days?

158 A. I do not know.

Q. 384. Did you receive any in that month after the 20th?

A. I do not know certainly, but think we did not.

Q. 385. Look at the letter now shown you, dated February 12th, 1873, signed Dewey, Vance & Co., filed and marked Exhibit "I," and state by whom it was written, if you know.

EXHIBIT "I."

WHEELING, W. VA., *February 12th*, 1873.

West Fairmont Gas Coal Co., Fairmont, W. Va.

GENTS: Your shipments of coke in January, say—

January	2	car	1757	w'g'd	25,300
"	"	"	721	"	25,000
"	22	"	261	"	28,100
"	23	"	179	"	27,600
"	29	"	2043	"	24,600
Total					130,600

Equal to 3,185 bushels coke, at 6c. per bushel, 90 ds.		$191 10
Less our invoice December 31st, mdse.	$34 90	
Less our invoice January 22d, mdse.	22 89	
And 80 ds. int. on bale. $133.31, at 9 per cent.	2 66	
		$60 45
Balance due you, cash		$130 65

For which we enclose our check in settlement.

Please acknowledge receipt and oblige,

Yours truly, DEWEY, VANCE & CO.

A. I believe it was written by Col. Wilkinson, our secretary.

Q. 386. Do you still think any Fairmont coke was used in making the iron sold to the Wheeling Iron & Nail Company?

A. It might have been used from an accumulated stock, though I am not prepared to say positively that it was.

Q. 387. Have you not testified that, to the best of your recollection, you had no Fairmont coke on hand after you discontinued its use in December, 1872?

A. I do not recollect that I have so testified.

Q. 388. What is your present recollection as to your having Fairmont stock on hand when you discontinued its use in December, '72?

159 A. My recollection is that we did have some stock of Fairmont coke on hand at that time; our receipts during November were 29 cars and December 17 cars, and our consumption during November was limited, and early in December my recollection is that we temporarily discontinued the use of it, and for several days used exclusively Connellsville coke, and afterward, being governed by the good working of the furnace during the latter part of December, we again resumed consumption of the Fairmont coke from the stock pile; that is the best of my recollection; I think there is a letter in the possession of the Fairmont Gas Coal Company, written by us about the middle of December, '72, informing them that we were at that time compelled to discontinue the use of Fairmont coke or reduce it to a very small percentage; my recollection is that we discontinued its use entirely until on or about the first of January, '73.

Q. 389. Did you from November, '72, to November, '73, except the times you have mentioned, continue the use of Fairmont coke, knowing that its use was deteriorating the iron produced?

A. We certainly did not know it, and hoped to use it in sufficiently small quantities to escape any very serious deterioration in the quality of the product.

Q. 390. When did you first learn that the use of Fairmont coke had seriously deteriorated the iron produced?

A. To the best of my recollection, some time in October, '72.

Q. 391. Did its use after that time seriously deteriorate the iron?

A. It did; but in varying degrees of deterioration.

Q. 392. Was that true as to all the Fairmont coke used after October, '72?

A. I think that all the coke used after October, 1872, was the cause of incorporating impurities in all, or nearly all, pig iron made from its use, the amount of the impurities in the iron from this source depending on the amount of Fairmont coke used.

Q. 393. Were they such as to seriously deteriorate the iron produced?

A. All of the iron produced was not seriously deteriorated, we having learned from experience how to partly guard against it. When I say seriously deteriorated I mean that it was not deteriorated as seriously as during the earlier period of its use.

Q. 394. Was most of it seriously deteriorated?

A. I do not think that the most of it was deteriorated to an extent to cause a very serious damage.

160 Adjourned to July 1st, 1879, on which day the cross-examination of the witness, F. J. HEARNE, Esq., was resumed after he made the following statement, to wit:

WITNESS: Mr. Hubbard, I am ready now to reply to that question you asked me on yesterday—whether I would ascertain, from inspection of Exhibits "J" and "K," whether we did actually make 3,180 tons of white and mottled iron while we were using Fairmont coke. I have analyzed the Exhibits "J" and "K" as closely as it can be done, disregarding fractions, and find that from the 6th of October, 1872, to November 30, '73, we produced, of white and mottled iron, 3,154 tons; of close, silvery, and weak gray, 1,294 tons. The above refers only to Exhibits "J" and "K," wherein the grading is done entirely by inspection; this has no reference to the other qualities shown by actual tests made by conversion into wrought iron in our mill. These tests we have no record of.

Q. 395. How much white iron appears by Exhibits "J" and "K" to have been made during that period?

A. It is impossible to tell, as there is no distinct record kept of white iron; white iron, mottled iron, and gray mottled all belong to the same class.

Q. 396. Don't those exhibits show a certain amount of iron produced which is on the record designated white iron?

A. They do; also show amounts of iron which are designated as mottled and white; also amounts of iron designated as gray, mottled, and white; hence the reason for not being able to separate the quantity of white iron.

All of the answer except the first two words objected to by Mr. Hubbard as not being responsive.

Q. 397. How much of each sort mentioned in your last answer is shown by Exhibits "J" and "K" as made within the period you have mentioned?

A. The question propounded yesterday was to ascertain the amount of white and mottled iron, and it is customary among users of iron to class white and mottled in one class or group, and was so taken from the exhibits showing 3,154 tons.

Q. 398. Can you answer the last question propounded to-day?

A. The records don't show how much of each kind, and I can't answer the question otherwise than contained in my last answer.

Q. 399. Haven't you said that those exhibits show a certain amount of iron produced, which is on the record designated white iron, and a certain amount that is designated on the record as mottled and white?

161 A. I have so said, and hence the impossibilty of telling how much of the iron designated as white and mottled is white, and how much mottled.

Q. 400. How much of the product in the period mentioned do those exhibits designate as white and how much as mottled and white?

A. I do not know.

Q. 401. Will you ascertain and state?

A. I will, if desired.

Q. 402. Do they also designate a certain quantity as mottled iron?

A. They do.

Q. 403. Will you ascertain and state that quantity?

A. Yes.

Q. 404. Is gray mottled iron white iron?

A. It is; it is a mixture of gray and white in the same pig.

Q. 405. How did you arrive at 3,154 tons from Exhibits "J" and "K?"

A. Disregarding fractions and taking the nearest unit I added the sums of all the white, mottled, white and mottled, white and gray, mottled gray, white mottled and gray, and gray mottled together, which gave the result above mentioned, 3,154 tons. I went over the additions but once, not supposing the exact amount to within a few tons would be essential, but I can verify the results, if desired.

Q. 406. What was the sum of each?

A. They were all placed in the same column and not separated for the purposes of ascertaining the sums of each kind.

Q. 407. Will you ascertain and state the sum of each?

A. I will.

Q. 408. Was that 3,154 tons iron which was deteriorated four dollars per ton in value?

A. No, sir; my testimony had no reference to the iron actually made further than as a guide in forming my judgment as to what the probable result would have been had the inferior Fairmont coke been used to the extent of one-third. I will add that I never made the estimates from Exhibits "J" and "K" until called upon by Mr. Hubbard to do so.

Q. 409. Why didn't you examine them, knowing that they existed and that you were to testify to damages arising from deterioration of iron?

A. I did not say that I had not examined them.

162 Q. 410. Did you examine them?

A. I did.

Q. 411. With reference to your testimony?

A. With reference to refreshing my memory concerning the events of the period during which we used inferior Fairmont coke and aiding me to testify correctly and intelligently.

Q. 412. Why didn't you use them to refresh your memory as to the actual amount of deteriorated iron produced?

A. My testimony does not have reference to the amount of deteriorated iron actually made. These records, Exhibits "J" and "K," will not show the amount of deteriorated iron made. They only show the iron which bears the evidences of deterioration in its color, and shows nothing concerning its qualities for the purposes for which the iron is made, namely, for conversion into wrought iron.

Q. 413. Is there anything else in existence which shows as nearly as that record the deterioration?

A. Nothing that I know of.

Q. 414. Then why didn't you refer to it for the purpose of enabling you to testify intelligently and correctly on that subject?

A. I did testify in the second answer above that it was referred to for the purpose of aiding me to testify correctly and intelligently.

Q. 415. Why didn't you refer to them for the purpose of enabling you to get, as accurately as possible, the quantity of deteriorated iron and to testify as correctly and intelligently as possible respecting the damages actually arising from such deterioration?

A. Because I have said above it does not show all the deteriorated iron. There was considerable iron marked gray on these exhibits which was deteriorated, as afterwards shown by the result of tests made in our mill.

Q. 416. But if, as you have also said, you knew of nothing that showed the deterioration as nearly as that record why didn't you refer to it for the purposes named in the last preceding question?

A. I have said that I did refer to it, but did not rely wholly upon it, because it does not contain mention of all deteriorated iron.

Q. 417. Have you said that you referred to it for the purposes last mentioned by me?

A. I have in meaning if not in exact phraseology.

163 Q. 418. Did you examine that record for the purpose of finding out the quantities of deteriorated iron by whatever name called?

A. Only as an aid to my judgment and refresh my memory concerning events referred to at that time connected with the operations of the furnace and the qualities of iron made as far as shown by these exhibits, though I examined quantities, casually or by observation, and though I made no additions showing the quantities as given by me this morning.

Q. 419. Why not?

A. I don't know.

Q. 420. Was it because you preferred to base your testimony on your assumption, rather than on the facts shown by your own records?

A. No.

Q. 421. Are all the kinds of irons you have mentioned as constituting the 3,154 tons white iron?

A. Yes; either white or having white in their composition.

Question repeated.

Repetition of question objected to by Mr. Russell because the question has been fairly and fully answered.

A. Not entirely white.

Q. 422. Which of them, if any, are entirely white?

A. White iron is supposed to be entirely white, though it is not always. The term "white iron" is a trade term, and is sometimes used to embrace iron that contains so little white in its composition as to almost or quite merit the term light gray, or pale gray, or gray mottled. I don't know that in my experience I have ever seen a piece of iron literally white.

Q. 423. Don't Exhibits "J" and "K" distinguish accurately between the different irons produced?

A. They do as trade distinctions and for the purposes of valuation, so far as values can be applied by appearances of its physical structure and color.

Q. 424. During what period of the use of Fairmont coke did the serious damage occur?

A. I think that after ten or fifteen car-loads had been shipped on the contract, and we entered upon the consumption of the succeeding shipments, the damages commenced slowly and less decided at first, because of the previous excellent working condition of the furnace. This commenced about the middle or latter part of October, and the irregularity of working was so great that we deemed it advisable to stop the furnace for about a week and make
164 necessary repairs upon the brick-work on the lower part of the furnace. We at this time availed ourselves of the opportunity to make other repairs, which might have been done with a much shorter stoppage. Upon resuming operations, or shortly thereafter, I think, with a reduced percentage of Fairmont coke in our mixture (the exact time I do not remember), the furnace still continued to work irregular until the early part of December, and I think the use of Fairmont coke was discontinued for a time. The improvement in the working of the furnace was very decided, and I think we again resumed the use of the Fairmont coke in small proportions. At intervals after that, owing to the gradual accumulations upon the wall of the furnace, we were compelled to discontinue the use of the coke, Fairmont coke, from time to time. I think that the serious damage existed at intervals throughout nearly the whole period of the use of Fairmont coke after the time above named, October, '72, though our most serious damage, I think, was incurred during the fall and early winter of '72, before we had learned to just what extent it could be used and how to limit its consumption, and at times discontinue its use and work the furnace back into good working condition.

Q. 425. Did you, knowing that serious damage had happened at intervals from the use of Fairmont coke, still continue its use?

(Question objected to as having been asked and answered before.)

A. We did. Even after knowing what their coke was manufactured from, the dirty quality of the slack, we did continue to use it at intervals.

Q. 426. You say in your cross-examination, "But we preferred to use the coke in smaller proportions and reduce the damage on each ton of iron to a corresponding extent." Did you then know that damage to your iron, although to a less extent, would follow the use of Fairmont coke?

A. We preferred to lessen the risk of damage, and in case of damage from lack of improvement in the quality of coke the extent of that damage on each ton of iron would be correspondingly reduced. We certainly did not continue the use of the coke in any quantity or proportion, knowing it to be as inferior as it had been. We had assurances from the West Fairmont Gas Coal Company that the quality would be improved, and we relied upon having that improvement made manifest. A certain letter, written by the
165 West Fairmont Gas Coal Company to us some time in February, '73, fully sets forth (oral evidence of the contents of the letter objected to by Mr. Hubbard) the promised improvement in quality that we were led to expect, with a corresponding freedom of risk from damage by its continued use.

(Answer objected to as not being responsive and question repeated.)

We certainly did not continue the use of coke in any quantity or proportion, knowing it to be as inferior as it had been and that damage to the iron made from it would follow. I do not comprehend how we could have had any exact knowledge of what the results would be before the coke was used in the furnace.

Q. 427. Why, then, did you say that you preferred to reduce the damage if you didn't know that damage would be certain or likely to follow the use of Fairmont coke?

A. I ought to have said that we we preferred to lessen the risk of damage, and should that damage result we would prefer it in a modified form.

Q. 428. Then you were not talking about any actual damage or any likely damage, were you?

WITNESS: I don't catch the meaning of that question?

Mr. HUBBARD: Were you speaking about an actual, probable, possible, or assumed damage?

WITNESS: I would like to see the point in my testimony; I don't desire to see it and I did not look.

A. I was talking about an assumed, probable, possible damage.

Q. 429. When you speak of the amount of iron proven by tests to be weak and rotten red short did you also assume quantity mentioned?

A. Yes, sir; that was assumed.

Q. 430. How could you assume a thing that had been proven by tests?

(Objected to because the witness has said that he assumed the quantity of rotten red short, but not that he assumed the fact that the tests proved.)

A. The same remarks made by me in my cross-examination a few days ago concerning my testimony on the deterioration of quality of iron with an assumed consumption of one-third Fairmont coke apply here. I assume that about one-third of the iron so made would be gray, but would be proven by tests to be weak and rotten red short.

166 Q. 431. Then when you said "proven by tests" did you mean would be proven by tests?

A. That is what I meant.

Q. 432. Did you sell any iron at less prices on account of its deterioration?

A. I don't think we did. It has been our almost universal custom to sell only, when any sales are effected, our best qualities of iron.

Q. 433. Was any money account kept of iron furnished by the furnace to the mill?

A. I am not certain that there was. I think that we kept an account only of quantities, and when closing our books in striking balances it was our custom to fix an arbitrary price per ton on all iron shipped from our furnace to our mill. This arbitrary average price was applied to the aggregate shipments during the whole period between times of inventory taking or closing our books.

Q. 434. Will you ascertain definitely and state in what manner your mill was charged with the iron furnished it by the furnace in '72 and '73?

A. I will.

Q. 435. Name the incompetent founder you had before September 15th, '72.

A. His name was Montgomery.

Q. 436. How long an experience had you had of the management of a furnace before that time?

A. My first connection with the Riverside furnace, and I had never had connection with any other, was the first part of May, 1872. Neither before or since have I had immediate charge of the practical details of running a furnace. We have always had a founder in immediate charge of the furnace.

Q. 437. Is your third item of damages wholly a matter of assumption?

A. It is, as based upon my best judgment.

(The testimony of the witness respecting that item, as also his other assumptions, objected to as not competent by Mr. Hubbard.)

Q. 438. Was not the average daily product of your furnace while you were using Fairmont coke, in October, November, and December, 1872, greater than its daily average product during any preceding period of equal length?

A. I do not remember, but it ought to have been greater after we changed founders, the 15th of September.

167 Q. 439. Will you ascertain and state whether it was not in fact greater?

A. I will try.

Q. 440. Was not your first plea rejected by the court instead of being withdrawn?

A. I have no personal knowledge concerning that point.

Q. 441. Why was the contract made for no more than an average of three cars daily of Fairmont coke?

A. I think that was the extent of their ability to supply us, though I did not make the contract, and am not prepared to answer definitely, and I have no personal knowledge of the reasons why the contract was for no larger amount.

Q. 442. Please read the 95th question and answer of your cross-examination and state how you had understood that the demand for their coke had so far diminished that they would at that time be prepared to manufacture coke from clean slack and freshly mined.

A. I do not remember whether it was reported to me as hearsay or whether it was my own conclusion from a supposed knowledge of their shipments to our furnace and across the river via Bellaire being so far reduced as to limit the demands for good slack. I do not know that I had any personal knowledge of the facts.

Q. 443. Didn't you use all the Fairmont coke ever delivered to you?

A. We did use nearly all. A small quantity was left scattered over the ground which was not carried into the furnace, and also a small quantity which we endeavored to burn in the fire-box of our locomotive, but failed; this last small quantity, I think, still remains at our furnace; with these exceptions I think it was all used in our furnace.

By consent, adjourned until to-morrow, Wednesday, July 2d, 1879, at 10.30 o'clock a. m., at which time the cross-examination of F. J. HEARNE, Esq., was resumed after he made the following statement:

Statement made by the witness, Frank J. Hearne.

WITNESS: In reply to questions asked during the cross-examination concerning certain facts respecting the amounts of certain kinds of iron made during the use of Fairmont coke, I find by taking the sums of each kind noted in the furnace records, marked Exhibits "J" and "K," exactly as they appear there in tons and pounds, we get the following totals: White iron, 1,149 tons 1,457 pounds;
168 mottled iron, 603 tons 1,190 pounds; white mottled iron, 627 tons 821 pounds; white mottled and gray iron, 175 tons 1,188 pounds; gray and white iron, 207 tons 1,600 pounds; gray and mottled iron, 363 tons 986 pounds; gray mottled iron, 123 tons 426 pounds, or a total of all iron which was white or partly white, 3,250 tons 874 pounds; silvery gray iron, 451 tons 1,006 pounds; weak gray iron, 255 tons 1,208 pounds; close gray iron, 569 tons 1,070 pounds, or a total of gray iron, which, from its physical appearance, had a valuation below the market price for good iron, 1,276 tons

1,016 pounds. In reply to a question of yesterday respecting the prices charged by our furnace for pig iron delivered to our mill during the years '72 and '73, I find that the arbitrary average prices were fixed at shorter intervals than I testified from memory. I find that the method stated in my testimony was adopted after 1873, and that the prices were fixed at shorter intervals during '72 and '73, probably on account of the rapid fluctuations in market prices during that time. The charges were made for '72 and '73 as follows: The average arbitrary price fixed for February, March, April, May, June, and July, '72, was $46 per ton; for August and September, 1872, $53.25; for October, '72, $50; for November, 1872, $46; December, '72, January, February, March, April, and May, '73, $42; June and July, '73, $36; August, September, October, November, and December, '73, $32. In reply to the question yesterday, "Was not the average daily product of your furnace while you were using Fairmont coke in October, November, and December, 1872, greater than its daily average product during any preceding period of equal length?" I find, upon referring to the furnace records this morning, that the daily average product during the period mentioned above was equal to and perhaps a little greater than any similar preceding period. As I have testified, our furnace during the "preceding period" was in charge of an incompetent founder, but after securing a competent founder, about the middle of September, '72, I do not think that the average daily production during the period above mentioned was as great as any equal period in the history of our furnace subsequent to the time mentioned, after the furnace was fully in blast and fairly under way.

Q. 444. Was the 1,276 tons of gray iron you have mentioned deteriorated to the extent of $2.00 per ton?

A. I think it was; and perhaps to a greater extent if placed on the market for sale.

Q. 445. On what do you base that opinion?

169 A. On my recollection of the market values at that time for that grade of iron. I have here an exhibit showing the market values of coke iron in the Pittsburgh market during the year 1873, which differs very little from the condition of our own market at that time for open gray forge, excepting the fact that our demand in Wheeling was mainly for open gray forge iron, and a limited demand for other grades, while in Pittsburgh there's a larger demand for grades below open gray forge, and the difference in price between the last-mentioned grades was perhaps less than in our Wheeling market.

The witness here filed the said exhibit referred to, which exhibit is marked Exhibit "H."

(This exhibit is, at the request of parties, not printed.)

Q. 446. Did you use or sell all the iron your furnace produced?

A. We used most of it and we sold some; it was all either eventually used or sold. I refer to the iron made during the time we used Fairmont coke.

Q. 447. Did you deduct anything from prices charged your customers or your mill for that iron on account of deterioration?

A. As I have already testified, we sold only our best grades of iron. The prices fixed between the furnace and our mill were arbitrary and had no significance, as it was taking the proceeds out of one pocket and placing it in the other and making no difference in the results shown by our year's business. We have been, perhaps, influenced to a large extent in charging iron from the furnace to the mill by a desire to treat liberally whatever department of the business most needed help in order to show a fair balance at the end of the year or at times of closing books and striking balances. We were also largely influenced in fixing these prices by ascertaining the average cost of all kinds of iron bought by our neighboring mills during a given period.

Question repeated.

A. We sold none of that iron to our customers that I am aware of, and as an average price was fixed for iron consumed by us there was no special price named for the iron above alluded to other than the average price, and hence in reply to the question I cannot say there was any deduction made.

Q. 448. Was not the charge against the mill for iron made for the purpose of enabling you to ascertain, as near as possible, the profit or loss of the mill and furnace, respectively?

A. I presume that was the purpose.

170 Q. 449. Could that purpose be accomplished except by making that charge as nearly as possible at the actual value of the iron?

A. While the object for making a charge of the iron from the furnace to the mill was for the purpose of determining the profits or losses of each, respectively, we were more interested in the aggregate results of our whole business than the accounts between the mill and the furnace, which were of secondary importance. In answering the question last put, will say that the purpose could not be accomplished exactly, except by making the charges for the iron as near the actual value as possible.

Q. 450. For the iron made while you used Fairmont coke, except such of the best iron as was sold, did not your firm charge the mill a price greater than the average market price of open gray forge iron?

A. I am not aware that we did—greater than the Wheeling market price.

Q. 451. What was the difference, in dollars and cents, between the Wheeling and Pittsburgh market price of that grade of iron?

Objected to because the grade of iron inquired about is not apparent in the question.

A. I do not remember that there was any fixed difference in price. The prices were governed by the supply and demand at each place and necessities of the buyer or seller, though I believe that the average of transactions in Pittsburgh and in Wheeling would not differ much in price, though I cannot say how much.

Q. 452. For the iron made while you used Fairmont coke, exclusive of such of the best iron that was sold, did not your firm charge the mill a price equal to the then average Wheeling market price of open gray forge iron?

A. I think we did, modified by the influences referred to in my testimony this morning. I think the charges were made on the same basis as though the iron had been made from Connellsville coke.

Q. 453. Does not the paper now handed you, and filed and marked Exhibit "G," state correctly for each month in 1873 the average market price of open gray forge iron, as shown by the exhibit produced by you this morning, and the price you charged the mill for the iron?

171 EXHIBIT "G."

	Av. m'k't price open gray forge iron.	Price charged mill by Dewey, Vance & Co.
1873.		
January	$40 25	$42 00
February	43 00	42 00
March	41 89	42 00
April	41 62	42 00
May	40 47	42 00
June	37 04	36 00
July	35 55	36 00
August	34 23	32 00
September	34 34	32 00
October	31 95	32 00
November	25 38	32 00
December	29 22	32 00
	435 94	442 00

A. I think it does.

Q. 454. Could not the aggregate results of your whole business have been ascertained just as well if no account whatever had been kept between the mill and furnace?

A. The same aggregate results could have been reached, but I do not know whether it would have been just as well.

Redirect examination of Mr. FRANK J. HEARNE by Mr. RUSSELL:

Q. 1. Look at the letter now shown you, filed and marked Exhibit "F," and say if you know who wrote it.

(NOTE.—This letter was, upon request, produced by Mr. Hubbard.)

EXHIBIT "F."

WHEELING, W. VA., *December* 31, 1873.

Mr. G. R. Van Alen, pres't West Fairmont Gas Coal Co., New York.

DEAR SIR: Your favor of the 29th inst. is received and contents noted. Taking a car to contain 600 bush. coke, your present new offer in comparison with old rates would stand as follows:

New, 600 bush. (40 lb per bush.) at 5¼c. on board	$31 50	
Add freight as charged by B. & O. R. R.	24 00	
		$55 50
Old, 600 bu. (41 lb per bu.) at 6c. is equivalent to	35 12½	
Add freight, $24.00, less $4.00	20 00	
		55 12½
The new proposition makes an excess of cost per car of		37⅞

172 We hope the experiment of washing your coke may prove a complete success.

Yours truly, DEWEY, VANCE & CO.

P. S.—In regard to amount shipped, the miserable coke you made from dirty slack threw us back on consumption of Fairmont coke to an extent we have scarcely recovered from now, and we ought to exact damages.

A. I think Col. N. Wilkinson, a member of the firm of Dewey, Vance & Co., wrote it.

Q. 2. Look at the letter now shown you, filed and marked Exhibit "E," and say if you know who wrote it.

(NOTE.—This letter was, upon request, produced by Mr. Hubbard.)

EXHIBIT "E."

WHEELING, W. VA., 28*th March*, 1873.

West Fairmont Gas Coal Company.

GENTLEMEN: Our furnace has been blown out for repairs, and our stock-house being entirely full we are compelled to unload coke out of doors. You will therefore oblige us by discontinuing shipments of Fairmont coke until further notice.

We will probably go into blast again about 15th May.

Yours truly, DEWEY, VANCE & CO.

A. I wrote it.

Q. 3. In your cross-examination, under date July 1st, you speak of assurances from the West Fairmont Gas Coal Company that the quality of coke would be improved, and of a certain letter written by the West Fairmont Gas Coal Company to you some time in February, '73; please point out that letter.

A. It is the letter marked Exhibit "T" of this deposition.

Q. 4. In your cross-examination, at page 70, question 56, referring to the West Fairmont coke and the Connellsville coke, you say, in answer to the question: "Q. If offered at the same price which would you have bought?" "A. Connellsville." Why would you have bought Connellsville?

A. Because Connellsville coke was well and favorably known in the market and had an established market value, and our own liberal use of this coke had rendered us entirely satisfied with its merits.

And further this deponent saith not.

FRANK J. HEARNE.

173 At the same time and place came WILLIAM L. HEARNE, another witness on behalf of the complainants, who, being first duly sworn, deposeth and saith:

Mr. HEARNE: I am in my sixty-first year, and reside in the city of Wheeling; was a member of the firm of Dewey, Vance & Co. in 1872-'3, and at that time had the management of the blast furnace, assisted by my son Frank.

Q. 1. Please state all that you know with relation to the beginning and continuance of the use, by your firm, of West Fairmont coke, beginning in 1872.

A. About the last of August, 1872, Mr. Van Alen, the president of the West Fairmont Gas Coal Company, came to our office in this city and introduced himself, I believe (I had not met or known him before), and stated that his company were manufacturing coke at Fairmont. He had a sample with him of the coke they were making; as handsome a sample as I ever saw. Mr. Van Alen himself seemed to be an intelligent gentleman and well posted on the subject of coke. He stated that this coke was a very heavy and strong coke, outweighing Connellsville coke several pounds. I don't remember how long he said his company had been manufacturing coke, but to the best of my recollection, on that day I received my first knowledge of the manufacture of coke at Fairmont from Mr. Van Alen himself. I think he said that the coke had been used by several parties for various purposes, and among them named Mr. George Hardman. By his representations and his sample exhibited to me I was induced by him to make an arrangement for a trial lot, to be used in our furnace. I don't think that there was any proposition on his part to supply us with all the coke that we could use in our furnace (I mean now the entire consumption) in any contingency; for, according to my best recollection, he then had a limited number of ovens in blast; the number I do not remember. I

think, however, that he stated that he had a lot more of ovens under construction and, perhaps, nearly completed; the whole number, if completed, would not have been sufficient to have furnished all the coke that our furnace would consume, no matter what the quality might be. Not long after this, and in accordance with the arrangements made with Mr. Van Alen, the West Fairmont Gas Coal Company commenced to ship us coke, which coke we commenced to use in the furnace about the 21st of September, 1872. The use of
174 this coke was commenced at first in a proportion of about one-fifth or one-quarter; whatever that proportion was it was gradually increased, as the results were ascertained to be satisfactory from tests of the iron daily produced; until the 28th of September, we had one-third of Fairmont coke in the furnace. I think after that time that the proportion was increased somewhat beyond one-third. The coke worked well and the quality of the iron continued to be satisfactory up to the fourth day of October. I will remark here that from the time the use of the Fairmont coke had commenced that I was at the furnace daily, from the commencement of the use of Fairmont coke to the fourth of October, except three or four days, one of which was Sunday, the 29th of September, I believe, and the 1st and 2d days of October, when I was absent from home. On the 4th day of October I came directly from the furnace to our office in this city, where I again met Mr. Van Alen. The use of the coke up to this time, to wit, the 4th of October, had been satisfactory to Mr. McCune, the founder, and my son Frank and myself, and the iron produced, as proved by tests made at our mill, was good. Mr. Van Alen, as before stated, met me at our office and wanted then and there to know what we were going to do about buying coke from him for future use. He stated his price; said he had already ascertained what the freight per car would be, and if we did not take the coke he would go at once to another party who would take it. He had recommended the coke as being satisfactory to other parties who had used it, and dwelled strongly on its superiority as heavy, strong coke, capable of bearing heavy burden and standing strong blast.

I am not certain about the exact number of pounds, above 40 pounds per bushel (which was the weight of Connellsville coke), which he said it, the Fairmont coke, would weigh; but I think it was four or five—that is, forty-four or forty-five pounds. I know, in bargaining with him we wanted him to give us as large a number of pounds as he said it would weigh to the bushel, which he would not do; he would only give us forty-one pounds. I think he stated, either in this conversation or the preceding one, that his coke would be low in sulphur. He assigned as his reason for that belief certain comparisons which had been made between his coal and other gas coals at the East (I mean where he said the tests had been made), between the gas produced from his coal and the gas produced by other gas coals, his showing a lower amount of sulphur than the other. I am not sure whether Mr. Van Alen
175 mentioned the name of any other furnace man (in either of these two conversations) who had used his coke at that time

in their furnaces, but I think he did mention others beside Mr. Hardman. I had no information or knowledge or prejudice or feeling about the Fairmont coke at this time other than was derived from Mr. Van Alen himself and our use of the trial lot in our furnace, to the best of my recollection. Predicated upon his representation and our use of the trial lot, we entered into a contract—a verbal contract—on that day for three car-loads per day, as set forth in the letter of the 7th of October, I think. It is the letter marked Exhibit "Z" of these depositions. In answer to our letter of the 7th of October (Exhibit "Z") setting forth the contract this letter was received (which is now filed and marked Exhibit "D"). After the 28th of September I think the consumption of Fairmont coke went on to at least the proportion of one-third as long as we had that much of the Fairmont coke to use it in that proportion or to that extent, the coke continuing to work well in the furnace and to give satisfaction for a time, which I cannot now state definitely, but was after the 7th of October. Some time, I think, between the middle and last part of October the results began to be less satisfactory; but I was absent from home during the very last part of October and the first days of November—I think about eight or ten days—and cannot say, of my own knowledge, what transpired during my absence. During the month of November and the first part of December the furnace began working badly, the fumes arising from the cinder showing presence of increased quantities of sulphur and damaging the iron, as shown by our daily tests made at the mill. We were consequently under the necessity of reducing the quantity of Fairmont coke and eventually taking it off entirely to get the furnace back into good working condition. In consequence of this bad working of the furnace and the reduction of the quantity of coke used and the stoppage for repairs the West Fairmont Gas Coal Company were written to to ship only one car per day.

Defendants object to the parol evidence of the contents of this letter, the letter itself being the best evidence. L. F. Stifel, N. P.

After the writing of that letter we received from that company a letter dated November 16th, 1872 (which letter is filed and marked Exhibit "C"). From time to time we continued using the Fairmont coke, sometimes increasing, sometimes reducing, the quantity, as circumstances demanded and required, and sometimes taking
176 it off entirely, as was done sometimes by Mr. McCune at night and during my son's and my own absence from the furnace. We would sometimes prevail upon him to resume the use of the Fairmont coke against his own will and protest. We continued thus, wondering and in the dark as to the reason why the coke was so different than the trial lot.

On the 12th day of December, 1872, I went to Fairmont and learned that they had for some time before that—how long I don't know—been making coke from an old slack bank containing all the dirt and sulphur from the bottom coal. I think both Mr. Brown and Davidson, officers of the West Fairmont Gas Coal Company, were there. I told them to suspend shipments for thirty days, as

they had informed me that Mr. Van Alen, the president of the company, who lived in New York, was expected out to Fairmont in a few days. I asked them to write to Mr. Van Alen to come by Wheeling on his way to Fairmont, as I wanted to see him in person before going any farther in the use of the coke. I did see Mr. Van Alen subsequently, and had a long conversation with him on the subject. He stated that the reason of their using that old, dirty, bad material for making coke was that they did not have enough slack from the freshly and clean mined coal to make coke for the supply of their customers, but that he would see the officers of the Baltimore and Ohio Railroad Company and try to make such arrangements with them on east-bound freight on coal as would enable him to increase his mining operations to such an extent as would give them all the clean slack from newly-mined coal as would suffice for their requirements; that in future the quality should be satisfactory, and we should have no cause for complaint. I believe he said that he did not know that that old slack bank would make such bad coke or he would not have done —. On my return home from Fairmont I wrote to Mr. Van Alen to New York, as above stated. This letter produced, upon request, by Mr. Hubbard, filed, and marked Exhibit "B." I think that I had one, if not two, other interviews with Mr. Van Alen prior to this other one of which I have just spoken of, and other than the other two detailed before. The time or times of the interview or interviews I cannot exactly fix, and at present only remember two circumstances which may have occurred at that interview or those interviews. There may have been one or two. Those two incidents are as follows, and may have occurred both at the same time. One was the telling me of his being on his way west—to Zanesville or Columbus, or both—and the other was his
177 taking dinner with me at my house. My recollection about the use of Fairmont coke is that after the early part of December and during the remainder of December, that we, a great part of the time, used no Fairmont coke in the furnace, or very little; and that during those two months the yield of the furnace, the aggregate yield, during those two months, December and January, was greater than at any time of similar duration through the entire blast. I speak from memory entirely, and have not examined the furnace reports to verify my recollection since February, 1873, at which time I did make up a detail of the amount of stock hoisted to the furnace top and the amount of iron produced in those two months. This I did for Otis Bros., of New York city, the builders of the steam hoisting-machinery used at our furnace. During the month of February, 1873, and until about March 21, 1873, when the furnace went prematurely out of blast, the use of the Fairmont coke was continued on a limited scale, but I think rather more used than in December or January.

EXHIBIT "B."

WHEELING, W. VA., *December* 13, 1872.

G. R. Van Alen, Esq., 77 Liberty St., New York.

DEAR SIR: Until yesterday we could not conceive why it was that the Fairmont coke would not work in the furnace as it seemed to do at first. We found the iron becoming brittle and the stack working very badly, so we were obliged to decrease the quantity of your coke, and finally to leave it out entirely for a time, till the furnace would come back to proper condition of working.

The most we can now use is one-sixth of yours and the other five-sixths of Connellsville. The mystery was solved yesterday, when the writer visited your works at Fairmont and there learned that the old slack bank containing all the dirt and sulphur from the bottom coal had been used for making coke for some time past. Learning that you are expected out next week, we request you to come this way and see us en route.

Very respectfully,

DEWEY, VANCE & CO.

By consent, adjourned until to-morrow, Thursday, July 3, 1879, at 10.30 a. m.

LOUIS F. STIFEL,
Notary Public.

And on this Thursday, July 3, 1879, the parties being represented by the same attorneys as yesterday, the witness, W. L. HEARNE, Esq., resumed his answer to the last question put yesterday, as follows:

178 As some time would be necessary for repairs and as we did not desire to be incommoded with the handling stock or to carry any more stock than we could help, we notified the parties shipping us coke to discontinue shipments during that time. The repairs, owing to the condition that the furnace was left in at the termination of the blast, proved to be a more serious job than we hoped or expected at the first. We used all possible diligence in expediting those repairs, but did not succeed in blowing in the furnace and resuming operations until about the 11th of June, '73. At that time we had considerable coke on hand; I do not remember how much, and don't know that I could have told within 5,000 bushels, of all kinds, even if my attention had been directed to it at the time. I do not know to what extent Fairmont coke may have been used in the furnace from the resumption of the blast until we again began to receive Fairmont coke. I think we did not receive any more of it until August. During August, September, October, and November I find that we did receive about 88 cars, which were used during that period, or afterward, with a very limited exception. I have only a general recollection of the working condition of the furnace, and the effect upon the iron during this period—from June to December, 1873, except in regard to one particular—that detailed by Mr. McCune in his testimony, which was recalled to my memory by

hearing him testify in relation to making neutral iron. My general recollection is that, when used at all, Fairmont coke was used in limited and varying quantities of one-sixth and less; and that, even though in that limited way, the effect was damaging and unsatisfactory. I will state from my recollection that I was not much about the furnace during the time the repairs were being made, though there occasionally, and so continued, after the resumption of blast in June, to visit the furnace less frequently than I had always done during the first blast; my son Frank having more particular supervision of the furnace and attending more constantly to matters connected with it, I giving my attention more to the mill and factory. I do not mean that I did not visit the furnace or give it any attention at all, for I was frequently there. During all this time particular attention was given to testing the quality of the iron made at the furnace, almost daily, by which we were enabled to detect any variation in quality or damage to the iron. During all this time, from October, '72, to December, '73, when the furnace was in blast,

she was burdened with a view to produce gray forge

179 iron for mill use, and not for any inferior or better grades.

I had other interviews and conversations than those detailed yesterday with Mr. Van Alen; I do not recall particularly the times or circumstances, but I do remember being present after I had ceased almost entirely to give much attention to the furnace and had surrendered the control and management to my son Frank, when Frank refused to receive any more coke from Mr. Van Alen; this was at our office in this city. My recollection about that is that Mr. Van Alen addressed himself first to me for the purpose of talking about the coke matter and that I told him that Frank was the man who now had charge of that department. Prior to this Mr. Van Alen and myself had had many conversations; from first to last possibly to the extent of seven or eight. I recall a conversation had with Mr. Van Alen, the time of which I cannot definitely fix, but think it was in the year 1874, in which he told me that he was going to investigate the cost and efficiency of machinery for the purpose of washing coal to rid it of sulphur. He told me that he had had already some car-loads of slack washed at a place called Carpenter's Station, I believe—I don't know just where that is, though—and the slack made into coke after being washed with what he considered very good results.

(So much of the foregoing answer objected to by the defendants as attempts to state a verbal contract between the parties differing from the contract reduced to writing in the letter dated October 7th and 8th, 1872.)

EXHIBIT "C."

FAIRMONT, W. VA., *Nov.* 16, 1872.

Messrs. Dewey, Vance & Co., Wheeling, W. Va.

GENTS: The shipment of the 14th was at the rate of one per day, as you requested.

To-day we ship you 3 cars in excess of your order on account of their being narrow tread, which prevents their crossing the river.

We shall endeavor to keep within the allotment of one per day.

Yours truly,

G. R. VAN ALEN, *Pres't.*
C. M. DAVISON.

EXHIBIT "D."

FAIRMONT, W. VA., *Octo. 8th*, 1872.

Messrs. Dewey, Vance & Co.

GENTS: Your much-esteemed favor of the 7th inst. enclosing your note at 90 d's from 1st inst. for eleven hundred and nineteen $\frac{90}{100}$ doll's on account of deliveries of coke received by this morning's mail, and for which please accept thanks.

We also acknowledge your acceptance of our offer to furnish you an average of three car-loads of coke per day to first of next July at (6) six cents per bushel of forty-one (41) pounds, to be settled for by your note at 90 days from the 1st each month for the previous month's deliveries.

Cars have been arriving very irregularly; hence the irregularity in shipping. We are, however, promised 4 per day by Mr. Sharp, ass't master transportation at Baltimore, and think that we may get nearly 24 per week.

We have now 10 to 15 car-loads upon our platform.

Yours truly, G. R. VAN ALEN, *Pres'd't.*

Q. 2. What do you know, if anything, about the paper now shown you, which is filed and marked Exhibit "A?"

EXHIBIT "A."

FAIRMONT, W. VA., *September 9th*, 1872.

Messrs. Dewey, Vance & Co., Wheeling.

GENTS: We are loading this afternoon three box cars with coke for your company and expect to continue the same number daily until twenty shall have been loaded and shipped; on arrival we should like to have you put it in your stock-house under cover.

We expected to have shipped you over two months since, but have been delayed in completing our ovens and have also been crowded with orders.

Most of coke we send will be from ovens that have been in action less than three weeks; consequently not as good as we expect it will be.

The writer expects to leave for New York the latter part of the week.

The freight will be $2 per ton. Test and report as soon as you can consistently.

Yours truly, G. R. VAN ALEN, *President.*

181 A. This is a letter written, I think, by Mr. Van Alen; it appears to be in his handwriting, dated September 9th, 1872, in which he says, "We are loading this afternon three box cars with coke for your company, and expect to continue the same number daily until twenty shall have been loaded and shipped." I take it that this was the commencement of the shipment of the trial lot of coke. Quoting further, "We expected to have shipped you over two months since, but have been delayed in completing our ovens and have also been crowded with orders." In this connection I desire to state — in testifying yesterday I stated that my first interview with Mr. Van Alen was about the last of August, 1872. I have no reason now, other than this paragraph, to modify my statement of yesterday in regard to the time of that first interview.

Q. 3. In the first conversation that you had with Mr. Van Alen what was said, if anything, by either of you with reference to the use which it was expected your firm would make of the Fairmont coke?

A. My recollection is that he told me the number of ovens that he had complete and incomplete and the use of coke by other parties whom he was furnishing would put it out of his power to supply us only to a limited extent. I do not now remember the number of ovens he told me that he had, but the impression on my mind made by his statements was that he could not supply us beyond the proportion of one-third of what we could use.

Q. 4. What, if anything, was said on that same subject in any of your subsequent interviews with Mr. Van Alen?

A. I don't think that he ever expressed an opinion of his ability to supply us more than that quantity, to wit, one-third.

Q. 5. What was said, if anything, at the first interview between yourself and Mr. Van Alen with reference to the place where it was expected that your firm would use the Fairmont coke?

A. I believe that Mr. Van Alen stated at this first interview that he understood that we had a furnace and he wanted to see whether he couldn't get us to buy coke from him for to use in that furnace. I remember that Mr. Van Alen had something to say or considerable to say on the subject of transportation; he said that his coke, being very heavy, did not occupy so much space in the cars as a given or equal weight of Connellsville coke, and that he had been able to get more than 600 bushels in weight loaded upon

182 cars that he had shipped and this would inure to our benefit if we took coke from him; he had already learned the rate of freight per car that the railroad company would be willing to transport coke to our furnace, and I think he said that he thought, if he could do much business with us, he might obtain a lower rate of

freight; he stated at the same time that he was shipping large quantities of coal over the Baltimore and Ohio railroad eastward.

Q. 6. What was said, if anything, at the first interview between yourself and Mr. Van Alen about the price at which the Fairmont coke could be furnished to your firm?

A. I think it was six cents a bushel for the coke and twenty dollars per car for transportation, but that he could make them average considerably over six hundred bushels per car; but we did not make any positive contract for the purchase of coke at that time more than for the trial lot.

Q. 7. What positive contract, if any, was made at that time for the trial lot with respect to price and quantity?

A. The price, I think, was as above stated, but I do not think there was any understanding at that time as to whether the bushel of coke was to consist of forty pounds or more; the quantity then arranged for was twenty cars.

Q. 8. What was said, if anything, as to price of coke in the interview of October 4, '72?

A. I remember of trying to get Mr. Van Alen to let us have as many pounds per bushel as he had previously stated the Fairmont coke would weigh; I am not precise in my recollection as to what that weight was, whether forty-four or forty-five pounds, but I do remember on insisting on forty-three pounds, which was, according to my recollection, a smaller number of pounds than he said it would weigh, but he would not consent to give us more than forty-one pounds per bushel; he seemed to think he ought to have some advantage himself from that superiority in weight and density in Fairmont coke above other coke.

Question repeated.

A. There was a good deal of talk between Mr. Van Alen and myself about other cokes than Fairmont; I think I told him all I knew about the cost and prices of Connellsville coke and Steubenville coke at our furnace, but I don't know that I can detail all that was said, *pro* and *con*, on the subject; I had, before October 4, informed the West Fairmont Gas Coal Company that the cost of Steubenville coke was 8.2 cents at our furnace; I think I also told
183 Mr. Van Alen what the cost was of Connellsville coke at our furnace—five cents per bushel for the coke at the ovens and forty dollars per car for transportation—and probably told him what the average number of bushels per car was.

Q. 9. Please describe the sample of coke which Mr. Van Alen had with him at the time of that first interview.

A. The sample was about as large as an ordinary man's head, beautiful light gray in color, of metallic lustre, dense and heavy, which I regarded as a sample of being perfect. He took the sample away with him when he left.

Q. 10. What was the quality of the trial lot of Fairmont coke sent your firm in September and October, 1872?

A. The quality was good.

Q. 11. How was that fact determined by you?

A. The fact was ascertained by using it in the furnace; first in a

more limited way and gradually increasing the quantity and by noting the working of the furnace and testing the quality of iron produced.

Q. 12. What was the quality of the Fairmont coke received by your firm after the receipt of the trial lot?

A. The most of it was bad. The first that came immediately following the trial lot continued to work along without much perceptible difference from the trial lot for some days; I don't remember just how long. As I stated on yesterday, I was absent from home several days and was not at the furnace during that period, the latter part of October and early part of November, but I think that the quantity of Fairmont coke had been reduced on account of its bad working before I left home. The developments afterwards, in November and early in December, were more decidedly bad, by or before which time we were compelled to take off the Fairmont coke entirely, as well as to reduce the burden, to get the furnace back in good working condition.

Q. 13. How were the bad qualities of the Fairmont coke received by you after the trial lot evidenced?

A. Well, they were evidenced by hanging, scaffolding, slipping in the furnace, and a running of black cinder, and a presence of strong fumes of sulphur at the times of flushing and casting, and production of white and other low grades of iron, which iron when tested proved to be of inferior quality.

Q. 14. What experience have you had in the use of coke?

A. My own personal experience commenced in February, 1872, in using chiefly Connellsville coke and some Steuben-
184 ville coke when we could get it; from that time on until we commenced using Fairmont coke, which was in September following.

Q. 15. What experience have you had in the manufacture of iron?

A. I have been engaged more or less in the manufacture of finished iron—as distinguished from pig iron—since the latter part of 1867, and have been more or less conversant with pig iron and its production since that time also, but only as a superintendent or a manager of furnace operation in the production of pig iron since February, 1872.

Q. 16. What of the qualities of coke, good and bad, can be ascertained upon the inspection thereof, and how do the appearances of coke vary, if at all, with such circumstances as exposure to the weather, length of time since it was made, etc.?

A. The imperfect manufacture or burning may be distinguished perhaps more readily than any other defect before exposure to weather. The appearance of coke that is desirable to the eye is a light gray color with lustrous appearance and somewhat of a ringing sound when handled or dumped, in contradistinction of a dull or dead sound; density and strength in preference over a light and friable article of coke; a dull, dead, smoky, dark appearance is not considered desirable. On exposure to weather for any length of time defects will appear in stains on the coke and discolorations which may not appear when first taken from the ovens. The qualities de-

sirable in good coke are high percentage of fixed carbon, low percentage of sulphur, low percentage of ash, density, and strength to enable it — bear up burden in the furnace and stand heavy blast.

Q. 17. How did the trial lot of Fairmont coke differ in appearance, if at all, from that which you afterwards received?

A. I don't think that my observation was sufficient to justify any discrimination in that particular, for the reason that I did not see any of the trial lot that had been exposed to the weather.

Q. 18. How much of a trial lot, if any, did you see?

A. I couldn't tell how much I saw; I saw it as it came and was being unloaded in the stock-house, a portion of it, and while it was being loaded on the barrows to be put in the furnace; I was there several times while the trial lot was being used, but not the whole time nor every day.

Q. 19. At the time you had your first interview with Mr. Van Alen where and in what business was George Hardman engaged?

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A. George Hardman was engaged in making pig iron, I think, in Preston county, West Virginia, at a point near the Baltimore and Ohio railroad, a few miles beyond Grafton.

Q. 20. When you reached Fairmont, on December 12, 1872, in what manner did you learn that the West Fairmont Gas Coal Company had been making coke out of an old slack bank, as already described by you?

A. From my own observation and the admission of the officers or employés of the company.

(Testimony as to admissions objected to, it not being shown who the officers or employés were or that they had authority to bind the company by their admissions.)

Q. 21. Please name the officers or employés referred to in your last answer.

A. Mr. Davidson, Mr. Brown, and Mr. Jackson. Mr. Davidson and Mr. Brown both were, I think, at the ovens or at the office. I saw Mr. Jackson at the hotel at Fairmont. The other employés whom I saw I cannot now name.

Q. 22. What connection, if any, had Mr. Davidson and Mr. Brown at that time with the West Fairmont Gas Coal Company?

A. I think they were both of them stockholders, directors, and each of them or both of them had some official connection with that company. I don't remember what their official titles or styles were, though we have had letters and communications from them.

Q. 23. What was said by either of the two last-named gentlemen with reference to the use of this slack bank?

A. Beside the admission of the use of the old slack bank for making coke, I think they said the matter would have to be referred to Mr. Van Alen, the president of the company, who was not then at Fairmont, but expected in a few days from New York. I did not remain long at the ovens, but requested them to write Mr. Van Alen to come by Wheeling on his way to Fairmont and see me, as I wanted to have an interview with him on the subject of making

coke out of the old slack bank, and in the meantime not to ship any coke for thirty days, so that I might have that opportunity.

Q. 24. What did you yourself see at that time with reference to the use of this old slack bank?

186 A. My recollections are not very distinct, but what I did see it was at an early hour in the morning when I landed there, but I did see enough to satisfy me that they were using that old slack bank for making coke.

Q. 25. In any subsequent conversation with Mr. Van Alen was any reference made to the use of this slack bank; if so, what was said?

A. There was; the conversation was in Wheeling. I think we had more than one conversation on the subject, but I am not certain that we had more than one. I think it was not until some time in January, 1873, when Mr. Van Alen came here. I told him of my visit to Fairmont; that I had learned that they were making coke out of that old slack bank, and of my having written to him on my return home, on the 13th of December, and my having requested Mr. Davidson and Mr. Brown to write him to come by Wheeling on his way to Fairmont, all of which he admitted. He was already apprised, and he gave his reason for having used the slack bank for making coke because they did not have enough slack of their daily mining to make the quantity required to fill his engagements. He expressed his sorrow and regret for the damage that had been done, and said that he would see the officers of the Baltimore and Ohio Railroad Company and try to make arrangements with them for freights east as would enable him to mine and take out an increased quantity of coal daily, such as would give him all the clean slack he required for his coke ovens.

Adjourned to July 5, 1879, at which time the examination of W. L. HEARNE was resumed.

It having been agreed by the parties that the defendants might at the conclusion of the examination-in-chief object to any part of the testimony to which they might have objected when the same was given, defendants now object to so much of the answer to third question of W. L. Hearne's examination as states the impression on witness' mind respecting the amount of coke Mr. Van Alen was able to supply.

The following question was then asked by Mr. RUSSELL, under the circumstances above stated, to cure objection there made:

Q. 26. In the first conversation between you and Mr. Van Alen what was said, if anything, by Mr. Van Alen with reference to the amount of coke which his company would be able to supply to your firm? Please state in substance what was said and not the impressions left on your mind.

187 A. He told me at that time how many ovens he had in actual use; what number I do not remember. He told me also of ovens which were in process of construction, perhaps nearly completed; neither do I remember the number of incomplete ovens,

but, altogether, they would not make coke enough to supply our furnace; neither did Mr. Van Alen propose to gve us a full supply, his capacity not being sufficient to do so.

Cross-examination by Mr. HUBBARD:

Q. 1. If Mr. Van Alen had been able to supply all the coke you wanted, would you have felt at liberty to take it from him in view of your then existing contracts?

A. I don't think there was anything in our contracts that would have precluded us from taking coke from Mr. Van Alen to any extent that we might have desired; but the circumstances being as they were that question did not arise, and I may properly say that I don't know what I would have done under the circumstances supposed in the question.

Q. 2. Did the question arise as to the amount that Mr. Van Alen was able to furnish?

A. My recollection is that three car-loads per day was all that he could supply in the near future, but could not supply even that amount at the first interview.

Q. 3. Which of you, if either, raised the question as to the amount that Mr. Van Alen could deliver?

A. I am not sure which first raised it.

Q. 4. How did it come to be raised, if at all?

A. I think it grew out of the statement of the number of ovens that he had.

Q. 5. How did he come to make that statement?

A. Well, I expect he could answer that question better than I.

Q. 6. Before you ever heard of the number of his ovens had you ever thought of taking more than one-third of your supply of coke from Fairmont?

A. I think I heard of the number of ovens and of Fairmont coke for the first time at that first interview of Mr. Van Alen's.

Q. 7. How many times did he tell you about the number of ovens?

A. I don't remember.

Q. 8. Do you remember more than once?

A. Not definitely, but I think he may have stated the number at subsequent interviews.

188 Q. 9. State each interview at which he mentioned it, so far as you recollect.

(Question objected to by Mr. Russell, because it has already appeared in testimony that the number of ovens was different at different times, and the question is not addressed to the number at any particular times.)

A. I haven't any other particular recollection of the number of ovens; but I think it probable that in the interview of the 4th of October he may have said something on the number of ovens that he had.

Answer objected to by Mr. Hubbard as not responsive, and question repeated.

A. I don't remember any more than I have said at this time.

Q. 10. At the time of these conversations with Mr. Van Alen hadn't you a contract for eight cars of Connellsville coke daily, more or less?

Objected to by Mr. Russell; the contract, having already been introduced, must speak for itself.

A. We had.

Q. 11. Did you remember that fact when contracting for Fairmont coke?

A. No doubt I did; our contract for Connellsville coke did not preclude us from buying other kinds of coke than Connellsville.

Q. 12. What was your daily consumption in cars?

A. The daily consumption was about eight cars per day, seven days in the week—frequently more than 56 cars per week. We received only six days in the week; consequently, nine or ten cars daily would not afford us more than sufficient margin.

Q. 13. Didn't you understand when contracting with Brown & Blain that you were contracting for all the coke you were likely to need during the time provided for by that contract, and didn't you give them to understand the same thing?

A. No, sir; we had the privilege of buying Steubenville coke, or other coke than Connellsville coke, under that contract whenever we had the opportunity of doing so.

Q. 14. Would you have felt at liberty during the existence of that contract to take your whole supply from either Fairmont or Steubenville.

A. That question never arose, and I cannot say how I would have felt, as it did not arise; but under the contract I think we would have been at liberty to have done so.

189 Q. 15. What did you say in any of your conversations with Mr. Van Alen previous to October 7th, 1872, about the amount of sulphur in the Fairmont coke?

A. I don't remember that I said anything particularly about the amount. I think what was said was by Mr. Van Alen himself, mostly.

Q. 16. If you said anything about sulphur in that coke what was it?

A. I may have asked him about sulphur—what amount of sulphur there was in it.

Q. 17. If you did so at which interview was it?

A. I suppose it was at the first or second interview.

Q. 18. Can you say which?

A. I think at the first interview; possibly at the second also.

Q. 19. Did Mr. Van Alen say that his coke would be low in sulphur or was low in sulphur?

A. I don't remember which words he used. It was something to that purport.

Q. 20. Didn't you know from the time you first heard of Fairmont coke that it was likely to contain more sulphur than Connellsville coke?

A. I did not.

Q. 21. Didn't you ascertain in your experience with the trial lot that it did contain more sulphur than the Connellsville coke?

A. Personally I did not.

Q. 22. Didn't you hear your son or Mr. McCune say so?

A. I have no recollection of hearing either of them say so while the trial was going on.

Q. 23. Did you not notice or were you not informed that from the first time that you used Fairmont coke the fumes from the slag were unusually strong from sulphur?

A. I did not notice it myself until after the trial lot was used, and do not remember of being informed by others until afterward, to the best of my recollection.

Q. 24. How much were you about the furnace during the use of the trial lot?

A. I was there every day, except Sundays, when I was at home.

Q. —. How much each day?

A. I went down in the morning after breakfast and spent
190 from one to three hours there, generally returning home to dinner. (My dinner hour is one o'clock.) Occasionally I would go down in the afternoon; do not remember whether I did so or how many times, if at all, during the trial.

Q. 26. Were you then capable of judging respecting the sulphur in the coke by the fumes arising from the discharges from the furnace?

A. Any one could judge to some extent, by a nasal observation of sulphurous fumes, that there was sulphur present to a greater or lesser extent at the times of flushing and casting.

Q. 27. Were you there at those times?

A. Yes, sir.

Q. 28. Did you rely on your own judgment or Mr. McCune's concerning the working of the trial lot?

A. I relied more on Mr. McCune's than my own as to the working.

Q. 29. Didn't Mr. McCune tell you that he thought you could work about one-third Fairmont coke regularly about the time you were finishing the trial lot?

A. I think he told me that he could work from $\frac{1}{3}$ to $\frac{1}{2}$.

Q. 30. Wasn't that the reason you limited your contract to an average of three cars daily?

A. That was one of the reasons.

Q. 31. At the time of your conversation with Mr. Van Alen, October 4th, '72, what was your opinion of the comparative values of Connellsville and Fairmont coke?

A. From what I knew of the working of the trial lot I supposed that we could use one-third Fairmont coke with two-thirds of Connellsville coke without detriment to the operations of the furnace or injury to the quality of the iron; consequently, at a lower price than that paid for Connellsville coke, it would be an economy to that extent to use it, but as a market value the Fairmont coke would not command the same price as Connellsville coke in the market.

Q. 32. Did you express that opinion to Mr. Van Alen in your talk, October 4th?

A. I don't remember whether I did or not.

Q. 33. What did you tell him respecting the result of your trial of the Fairmont coke?

A. Don't remember just what I did tell him.

Q. 34. Didn't you tell him during that conversation substantially what Mr. McCune had told you?

A. As I said before, I don't remember just what I did tell him.

Q. 35. Don't you remember that you did tell him something respecting your trial of the coke?

191 A. It is not at all unlikely that I did tell something respecting it, but I don't remember what it was or whether I told him anything.

Q. 36. Who were present at your different interviews with Mr. Van Alen?

A. At the first interview there was a young gentleman, quite a young man, I think, who came with Mr. Van Alen, whose name I do not remember, and I don't remember whether he was present all the while. I hardly think he was. I don't remember whether there were any other person present or not, or during any part of it; there may have been. At the second interview Col. Wilkinson was present; I don't think any person else, excepting Mr. Van Alen and myself. In respect to the time my son Frank refused to receive any more coke, I think there were other persons present in our office, but I don't know who they were. As to the other interviews I do not know who were present, except that at one time Mr. Van Alen took dinner with me. At that time my family was present.

Q. 37. Was your verbal contract with Mr. Van Alen for three cars of Fairmont coke daily or for an average of three cars of coke per day?

A. I don't remember that there was any difference between the verbal contract and that which was afterwards reduced to writing in the letters of the 7th and 8th of October, I believe.

Q. 38. Please state, as nearly as you can, what the officers or employés of the West Fairmont Gas Coal Company said in making the admission you have testified to respecting the slack bank.

A. I got off the train right at the tipple dump, right at the mine, early in the morning and I saw a few men around there. Before I went up the hill to the office I looked around some. I don't remember whether I said anything to the men or not—that is, about making use of the slack bank for making coke. I am not certain that I did, but I saw enough that satisfied me that they were using the slack bank for making coke, and when I went up the hill to the office I so stated to Mr. Davidson and Mr. Brown. I think they were both there. They owned that they were making coke from that slack bank. I told them that that material wasn't fit for making coke, and that we had had great trouble with the furnace on account of the bad quality of the coke for some time past, and I supposed that that was the cause of it. I am not sure whether they said that

that was done with Mr. Van Alen's directions or not, but
192 they referred to him as being the highest authority in the company, and stated they were looking for him out in a few days, I think—the week following. After asking them to write Mr. Van Alen to come by Wheeling and see me, I think I left pretty soon and went over to Fairmont.

Q. 39. Was that all they said?

A. I don't know that that was all, but I do not remember anything else particularly that they said.

Q. 40. How, then, did you learn that the old slack bank contained all the dirt and sulphur from the bottom coal?

A. I learned that from Oliver Jackson.

Q. 41. What did he say about it?

A. He said in running in their tramways into the mine and rooms that the bottom was not level and in laying those tracks that they had to break up a good deal of that bottom seam containing the sulphur and dirt, and that that was hauled out and dumped on that old slack bank or waste heap.

Q. 42. Were Brown and Davidson both present during all the conversations you had with either of them?

A. I don't think they were. I think one of them met me as I went up the hill. I do not remember which this was, but probably Mr. Davidson. I rather think it was Mr. Davidson, but I am not sure.

Q. 43. Then, was Mr. Davidson present during all your conversations with Mr. Brown?

A. I don't remember.

Q. 44. Was any one else present during those conversations?

A. I do not remember any one else.

Q. 45. Where was the conversation with Jackson, and who was present?

A. At the hotel in Fairmont, and I don't think there was any one else present. I don't remember any one else.

Q. 46. Did Mr. Van Alen in his conversation with you about this slack bank speak of it as that old, dirty, bad material for making coke?

A. I think I spoke of it in that way to Mr. Van Alen. I don't remember that he did.

Q. 47. Were you present during the whole of the testimony of Mr. McCune and Mr. F. J. Hearne?

A. I was mostly so, but did not hear all the questions and answers.

Q. 48. Did you read such as you did not hear?

A. No, sir; I haven't read any of them.

193 Q. 49. Did you, in the recesses or adjournments during their testimony, converse with them or either of them respecting the matters about which they had testified or were expected to testify?

A. I think I did talk some with Frank on the general subject of the case.

Q. 50. When the West Fairmont Gas Coal Company were writ-

ten to to ship only one car per day were they informed that it was in consequence of the bad working of the furnace?

WITNESS: What letter do you refer to, Mr. Hubbard?

Mr. HUBBARD then read from witness' testimony.

A. I don't know that they were; I didn't write that letter myself.

Q. 51. Why do you speak of the furnace going out of blast in March, '73, as premature?

A. I so speak of it because it was entirely unexpected and came suddenly, occurred suddenly from the iron and cinder going down to the bottom of the hearth into the foundation, when we were not looking for anything of the kind.

Q. 52. Were the proper steps then taken to remedy the difficulty that occurred and save expense and trouble?

A. Yes, sir; we did the very best we could to get into blast again as soon as possible.

Q. 53. Don't you now think that when the accident occurred you might have taken steps which would have been less expensive and troublesome than those you did take?

A. I don't know that we could.

Q. 54. Was not that occurrence very expensive to you?

A. It was.

Q. 55. Did you then have a competent founder in charge?

A. I have always thought so, and think so yet.

Q. 56. You say that from October, '72, to December, '73, when the furnace was in blast, "she was burdened with a view to produce gray forge iron for mill use and not for any inferior or better grades," did not the furnace during that time often produce grades better than that for which she was burdened as well as grades inferior to that?

A. She often produced inferior grades, but very seldom a better grade.

Q. 57. How do you account for the occasional production of a better grade of iron than that for which the furnace was burdened?

194 A. By the reduction of the burden which we are often obliged to resort to when the furnace would get into bad condition of working from the use of Fairmont coke, the burden would have to be reduced so much that the result would be sometimes the production of foundry iron, which is a better grade, before proper condition of working would be obtained, and then the burden would be increased to a proper amount to produce gray forge iron, which is the next grade below foundry iron.

Q. 58. Wasn't foundry iron sometimes produced when you had not been using Fairmont coke?

A. Yes, sir; sometimes; but we always tried to avoid making foundry iron, there being little or no market for it here.

Q. 59. How did it happen that in those cases when you had not been using Fairmont coke you made foundry iron when you were trying to avoid it?

A. That would occur when the furnace was in fine working condition and running very fast, and the furnace would go directly from the producing of gray forge iron to a production of foundry iron without any reduction of burden. In the other case it would

run from one extreme to the other by the reduction of the burden to reach proper working condition.

Q. 60. Is it not true, then, that the quality of the production of a furnace is sometimes beyond control, although the best material and care are used?

A. In a certain sense that may be true, but not absolutely. The quality of the iron produced, whether white, mottled, or gray, is affected otherwise than by its color, but the color of the iron produced may vary when the circumstances are apparently uniform.

Q. 61. Do not your furnace reports contain a column headed "Remarks," intended and used for noting the general condition of the furnace and any accidents or unusual circumstances that might happen?

A. There is a column for remarks, but I cannot testify as to the extent of the use of those columns.

Q. 62. Don't those reports show in those columns that there were slippings and other troubles of that sort in that furnace before September 15, 1872, and again after November 30, 1872, but fail to show any between those dates?

A. I don't know.

Q. 63. Will you examine those reports and make further answer?

A. They are here and will show for themselves.

195 Q. 64. Do you decline to do so?

A. I do not decline to examine here and now in the presence of the notary and counsel; I don't want to take them away to make an abstract or compilation to be picked to pieces. Having examined the furnace reports from February 7, '72, to January 11, '74, under the head of remarks, I find under date of night of 19th or morning of the 20th of August that the furnace slipped: "February 8, 1873—3 o'clock p. m. Furnace hanging near top until about 9.30 p. m.; then slipping gently." These are all I find in the reports. The last date and quotation I find at the bottom of the reports and not in the column. The column for remarks is filled with other matter.

Q. 65. State as definitely as you can when the furnace commenced working badly after October 4, 1872.

A. I cannot state definitely, but think it was between the middle and latter part of October.

Q. 66. Might not such troubles as slipping, hanging, and scaffolding be the result of other causes than Fairmont coke?

A. They might.

Q. 67. State as nearly as you can when the interview with Mr. Van Alen took place, at which Mr. Frank Hearne refused to take any more coke.

A. I cannot state definitely when that interview took place, but I think it was the last time I ever saw Mr. Van Alen; I think it was either in 1874 or in 1875; I am not sure of the year even.

Q. 68. At the time of that conversation state, as nearly as you can, the cost of Connellsville coke delivered at your furnace.

A. I don't remember what the cost was at that time. I had given up the management of the furnace.

Q. 69. What damage was it that Mr. Van Alen expressed his sorrow and regret for in his conversation with you here after your visit to Fairmont?

A. The damage I told him of, resulting from the coke made from that old slack bank.

Q. 70. What did you say to him about the damage?

A. I think I told him about the same I wrote to him December 13, 1872, which letter he had already received.

Q. 71. What other statement or claim of damage did your firm ever make to the West Fairmont Gas Coal Company or any of its officers or agents before it brought suit against you?

A. I think there was a letter written to the West Fairmont
196 Gas Coal Company, stating that we had been damaged, dated August 30, 1873, but I am not aware that any claim against them for damages was ever made to be paid by them to us.

Redirect examination by Mr. RUSSELL:

Q. 1. By whom were the furnace records to which you referred prepared, and what, if anything, have you ever had to do with them?

A. They were prepared by William Crockard mostly, from February, 1872, to November, 1872, and after that time by William Crockard and my son Frank. I have never had anything to do with the making of those reports.

By consent, adjourned until the 6th day of February, A. D. 1880, on which day the re-examination of Mr. W. L. HEARNE was continued as follows:

Re-examination by Mr. RUSSELL:

Q. 2. Please look at the paper now shown you and say whether you know what it is.

(Upon request of complainants Mr. Hubbard produced the letter referred to in this question, which is filed and marked Exhibit "W. L. H. No. 1," which is shown witness. L. F. Stifel, notary public.)

EXHIBIT "W. L. H. No. 1."

WHEELING, W. VA., *Sept.* 28, 1872.

O. Jackson, Esq., ag't, Fairmont, W. Va.

DEAR SIR: I commenced this week using a portion of your coke in connection with Connellsville and Steubenville coke, about one-third of each. The experience as yet is too limited to judge with positive certainty of the results, but so far we see nothing to condemn its use. As we are without any certain understanding as to what it is going to cost, and as we have a contract for Steubenville coke which will expire in December, we would like, before making arrangements for a full supply elsewhere, to learn definitely what you can do towards supplying us, both as to price and quantity. The Steubenville coke which we would propose to have yours take the

place of in the future is costing us now 8.2 (eight and two *cents*) per bushel at the furnace. We suppose we could use steadily four cars per day of yours if price and quality suit. Please let us have an early answer.

197 Continue shipping at least 4 cars per day until further advised, as we desire to test it fully.

Very truly yours, DEWEY, VANCE & CO.

A. This is a letter written by me on the 28th of September, 1872, addressed to Oliver Jackson, agent. There is also on the margin one line and part of another line written by Col. Wilkinson; these lines were written by Colonel Wilkinson before the letter was sent.

Q. 3. What relation, if any, did Oliver Jackson have at that time to the West Fairmont Gas Coal Company?

A. My understanding was that he was acting in the capacity of agent, and I so addressed him.

(The defendants, by their counsel, waive notice to produce the originals of letters, dated September 20th, 1872, and August 30th, 1873, but state that those originals are not in their possession. Louis F. Stifel, N. P.)

Q. 4. Please state, if you know, whether your firm wrote to the West Fairmont Gas Coal Company on the 20th of September, 1872, and on the 30th of August, 1873; and, if possible, produce or account for the letters of those dates.

A. Here is a letter book containing copies of letters written by Dewey, Vance & Company from May 29, 1872, to October 19th, 1872, and on page 674 there is a copy of a letter written by my son, Frank J. Hearne, addressed to the Fairmont Coke Company, Fairmont, West Virginia. Here is another letter book containing copies of letters written by Dewey, Vance & Company from July 23rd, 1873, to October 29th, 1873. On page 205 there's a copy of a letter written by my son, Frank J. Hearne, addressed "Secretary of the West Fairmont Gas Coal Company," dated 30th of August, 1873; the other is dated the 20th of September, 1872—the first one. Those books contain copies of letters which were sent by mail or otherwise, generally by mail, to the persons to whom they were addressed.

Q. 5. Where are the originals of the letters referred to in the last questions?

A. They must be in the possession of the West Fairmont Gas Coal Company.

Q. 6. What reason, if any, have you for saying that?

A. My reasons are that I have scarcely ever known of an instance of failure of a letter to fail reaching its destination in our

198 correspondence, copies of which are contained in those books. At least I cannot recall any failure at this moment.

Q. 7. How were the copies of the letters—copies of which are in those books—made?

A. They were made in the usual way in which they are made in "Mann's letter books," by wetting the page, putting in the original

letter, and putting under press for a few minutes so that the handwriting of the writer could easily be identified by those knowing it.

Q. 8. Please file the two pages of those books containing the letters last referred to.

(The admission of those pages objected to, because there is no evidence that either of them was received by or even mailed to the West Fairmont Gas Coal Company, and because that one dated September 20th, 1872, was not addressed to it. Louis F. Stifel, N. P.)

Witness cuts the two pages referred to out of the letter books and they are filed and marked, respectively, Exhibits "W. L. H. No. 2" and "W. L. H. No. 3." Louis F. Stifel, N. P.

EXHIBIT "W. L. H. No. 2."

20TH SEPTEMBER, 1872.

Fairmont Coke Co., Fairmont, W. Va.

GENTLEMEN: We have been unable thus far to test your coke, but hope to do so very thoroughly, and therefore desire a shipment of about forty (40) cars instead of twenty. Forward a larger number daily than you have done, as we are compelled to "stock it" until all has been rec'd. It is our intention to work it with one-half Connellsville, and, if found satisfactory, to then work it alone. Our daily consumption is about eight cars, hence the necessity for more than twenty cars in order to treat it impartially.

Yours truly, DEWEY, VANCE & CO.

EXHIBIT "W. L. H. No. 3."

30TH AUGUST, 1873.

Sec't'y West Fairmont Gas Coal Co., Fairmont, W. Va.

DEAR SIR: We are sorry to inform you that we have had
199 further trouble at our furnace from too liberal use of your coke. We cannot, under any circumstances, consume more than one car-load of your coke daily, and trust that you will in future limit your shipments to that amount.

We have endeavored very earnestly to use it and we reluctantly forward the above instructions only after having made a great number of trials of its merits.

Yours truly, DEWEY, VANCE & CO.

Q. 9. State whether in 1873 there was any coke company at Fairmont other than the West Fairmont Gas Coal Company with which your firm had any business correspondence.

(Objected to by Mr. Hubbard as being irrelevant and leading. L. F. Stifel, N. P.)

A. I think Oliver Jackson made coke. I don't know whether it was on his own account or whether he was a member of a company, and there was probably some correspondence with him. I know our firm had some correspondence with him both before and

after 1872, and possibly during that year. There was another coke company, I think, besides Oliver Jackson. I think it was called the Marion Company, with which the West Fairmont Gas Coal Company was afterwards consolidated. Our firm may have had some dealings with them. We have also had dealings with J. O. Watson, but I don't think he made coke, to my recollection.

Recross-examination by Mr. HUBBARD:

Q. 1. Do you know anything about the two pages you have filed except that they are press copies of papers in the handwriting of your son?

A. I have no other knowledge than I have stated in my direct examination.

Q. 2. Haven't you stated some things that you do not know but simply infer?

A. I don't think I have.

Q. 3. Is it within your knowledge that the originals of those papers were ever mailed?

A. No, sir.

Q. 4. Did you ever see those originals?

A. I don't remember whether I did or not. I may have seen them.

200 Q. 5. Did your firm ever receive an answer to either of them or an acknowledgment of its receipt?

A. I don't know that they did. If any such answers were received they are not now at hand.

And further this deponent saith not.

WM. L. HEARNE.

By consent, adjourned until 2 o'clock p. m., to-morrow, February 7, 1880.

LOUIS F. STIFEL, *N. P.*

WHEELING, W. VA., *February* 7, 1880—2 o'clock p. m.

Office of H. M. Russell, Esq.—Present: H. M. Russell, Esq., for complainants; W. P. Hubbard, Esq., for defendants, and F. J. Hearne, witness.

Re-examination of F. J. HEARNE, Esq., by Mr. RUSSELL:

Q. 1. Look at the two papers now shown you, marked Exhibits "W. L. H. No. 2" and "W. L. H. No. 3," and say what you know about them and about the originals of which they appear to be copies.

A. I believe them to be impressions of letters written by me, the originals of which I believe were forwarded to the West Fairmont Gas Coal Company by mail.

Q. 2. When?

A. Within a few hours after having been written.

Q. 3. Do you know or have you any reason, other than the fact that the originals were written and forwarded, for believing that those originals were received by the West Fairmont Gas Coal Company?

A. The letters were written in good faith and, I believe, forwarded by mail, and the requests therein made were complied with by the West Fairmont Gas Coal Company, so that I believe the originals were received by them.

Recross-examination by Mr. HUBBARD:

Q. 1. Have you any recollection about the mailing of the originals?

A. No, sir.

Q. 2. Didn't you always mail your letters to the addresses appearing on the face of them as copied?

A. I do not remember personally mailing any letters. My usual custom, and presume that it was so in this instance, was to
201 leave letters written by me with our secretary or his assistants to take the impressions and add the superscriptions on the envelope and attend to the mailing. I presume that any error in the direction would be detected by them.

(The last sentence of the answer objected to as incompetent by Mr. Hubbard. L. F. Stifel, N. P.)

Q. 3. Look at Exhibit "W. L. H. No. 2," and say whether the Fairmont coke was "found satisfactory?"

A. It was found partially satisfactory.

Q. 4. In what did it fall short of being satisfactory?

A. It was found satisfactory to the extent to which we used it; to the extent to about one-half or three-fifths; we did not try it alone

Q. 5. Why not?

A. We did not have a sufficient quantity.

Q. 6. If so, look at Exhibit "W. L. H. No. 1," and state, if you can, why, on September 28, 1872, your firm wrote, "We suppose we could use steadily four cars per day of yours if price and quality suit."

A. I suppose it means precisely what it says.

Q. 7. Can you make any further answer to the last question?

A. I know of nothing further to add.

And further this deponent saith not.

FRANK J. HEARNE.

Certificate in usual form.

Depositions for Defendants.

Depositions taken in Fairmont, W. Va., January 2, 1880.

Present: Wm. H. Hearne, for complainants, and James Morrow, Jr., for the defendants.

CHARLES M. DAVIDSON, a witness of lawful age, being by me duly sworn, deposes and says:

Q. 1. What is your name, age, and occupation?

A. C. M. Davidson; 39 years old, and I am the agent of the West Fairmont and Marion Consolidated Gas Coal Company.

Q. 2. What was your business in October, 1872, and subsequently?

A. At the time I was clerk of the mines belonging to the West Fairmont Gas Coal Company and the Marion Gas Coal Company, and resided at the mines near Fairmont.

202 Q. 3. Do you recollect when the West Fairmont Gas Coal Company commenced the manufacture of coke at its mines near Fairmont?

A. I remember when they first commenced, but I do not remember the date.

Q. 4. Do you remember the fact of the contract in respect to coke between the parties to this cause?

A. I do.

Q. 5. Had the West Fairmont Gas Coal Company ever manufactured coke before that contract was entered into? If so, state to what extent.

A. They had manufactured coke, but I cannot recollect to what extent; I expect it was a good deal.

Q. 6. How long before that contract was the first coke ovens built by that company?

A. I think a year.

Q. 7. How many were built before the making of that contract?

A. I don't know that I could say.

Q. 8. Give your best judgment.

A. I think there were thirty or forty of them; we have forty-eight or fifty of them now.

Q. 9. To whom had you delivered coke prior to the making of the contract with Dewey, Vance & Co.?

A. The Marion Machine Works, Hardman's furnace, and I think some parties out West.

Q. 10. I would be glad you would state, if you know, how much coke the West Fairmont Gas Coal Company had manufactured and sold prior to the 4th day of October, 1872.

A. I do not know.

Q. 11. Are you certain that it had delivered any except a small quantity to Hardman's furnace and a quantity to the firm of Dewey, Vance & Co.?

Objected to, first, because it is leading; and, second, because the witness has already stated that coke was delivered to several firms in his prior testimony named and to others in the West unnamed.

A. I am not.

Q. 12. I now ask you to make such examination of data as may enable you to answer this question as nearly accurate as possible.

A. I have made an examination and find that there was a quantity delivered to Dewey, Vance & Co., to Hardman's fur-

203 nace, and to E. A. Fitz & Co. prior to the 4th of October, 1872; also two car-loads to the Marion Machine Works; 57 cars to Hardman's furnace; 70 cars to E. A. Fitz & Co., and Dewey, Vance & Co. had about 32 or 33 car-loads.

Q. 13. The last answer indicates that the quantities enumerated are in addition to quantities before delivered to the parties. Is that your meaning?

A. It is not. The enumerated quantities are all that was delivered prior to the 4th day of October, 1872.

Q. 14. When and by whom was the first coke manufactured in the valley of the Monongahela river within this State?

A. So far as I know, by our company in 1871.

Q. 15. Was that the coke which you have mentioned above in you answer to question No. 12?

A. It is.

Q. 16. At the time that manufacture was commenced by your company was it known to any person, so far as you are aware, what quality of coke could be produced from your coal or from any part of the coal field of the Monongahela Valley of which yours is a part?

A. It was not.

Q. 17. Was any such coke or had any such coke ever been manufactured or known to the trade anywhere prior to the time the manufacture was commenced by your company?

A. Not that I know of.

Q. 18. What information did your company have in regard to the quality of your coke or of the coke that might be produced from your coal at the time the contract was entered into between your company and Dewey, Vance & Co.? I mean October 4th, 1872, and state from what source such information had been obtained.

A. We understood that the coke made was good and we got that information from George Hardman and also from the Marion Machine Works. I don't think that we ever heard anything good or bad from Fitz & Co., they being retail dealers in coke.

Q. 19. Did the company receive any report from Dewey, Vance & Co. prior to October 4th, 1872, in regard to the coke delivered to that firm or how it answered their purpose?

A. I always understood that they had reported favorably to the president of our company.

Q. 20. With what officer of the company was the correspondence had between the company and Dewey, Vance & Co. in regard to the coke and the contract?

204 A. With its president, Mr. J. R. Van Allen.

The two previous questions and answers objected to on the ground that the letters of the correspondence is the highest evidence.

Q. 21. Did you have anything to do as an agent of the company in the making of the contract with Dewey, Vance & Co of October 4, 1872?

A. Nothing at all.

Q. 22. Do you know what representations, if any, were made to said firm by your company in regard to the quality of the coke which was to be delivered under the contract?

A. I do not know.

Q. 23. Do you know the object which the company had in sending and which Dewey, Vance & Co. had in receiving the coke sent to them prior to the making of the contract of October 4, 1872?

A. Yes, sir; it was for the purpose of finding out if the coke would be used by Dewey, Vance & Co. in making iron.

Q. 24. Did your company on or prior to the 4th of October, 1872, have any information in regard to the quality of their coke other than that which they had derived from George Hardman, Marion Machine Works, and Dewey, Vance & Co.?

A. No, sir.

Q. 25. Was there any means or had there ever been any from which they could have derived any information beyond that described in the last preceding question?

A. No, sir.

Q. 26. Prior to that time—I mean prior to October 4, 1872—had any test or experiment ever been made with the coal lying along the Monongahela river, in this State, with a view of ascertaining what kind of coke might be made from it or whether such coke would be fit for use in the manufacture of iron?

A. No, sir; none but those I have stated in former answers.

Q. 27. Did you have any duty to perform in relation to the coke manufactured by your company?

—. None; clerical duties.

Q. 28. What opportunities did you have of observing the quality of coke made there from time to time?

A. I was on the coke yard every day; was in the habit of measuring cars and seeing that they were properly filled, and looking after the shipments generally, and these occupations gave me a good opportunity of seeing and inspecting the coke.

205 (Objected to for the reason that the witness has not shown that he is an expert or knows the quality of good coke.)

Q. 29. Now, I want you to state how the coke delivered to Dewey, Vance & Co. under the contract of October 4, 1872, compared with that which had been delivered to them from your coke ovens prior to the same date; I mean, of course, how did it compare in quality.

(Objected to for the reason just above stated.)

A. Very favorably, I believe.

Q. 30. Was there any difference in the method of its manufacture or in the material from which it was manufactured?

A. There was no difference in the method of its manufacture at any time, and but once in the material that I know of, at which time some slack was used which was taken from a large slack pile, but learning from Dewey, Vance & Co. that the coke was not quite so good we stopped the use of the same immediately.

Q. 31. From what material (I mean what portion of the coal) is it customary to manufacture coke?

A. From the slack and screenings.

Q. 32. I have no special reference to the method at your ovens; I wish you to state whether that is the material used by coke manufacturers generally.

A. It is by those, so far as I know, who are regularly in the coal business, because it is necessary to use fine coal or slack; where coal is so soft as to crumble up and make slack in the process of mining, it is not necessary to screen coal to get the slack; this is my understanding.

Q. 33. Have you any knowledge of any complaint having been made by Dewey, Vance & Co. of the quality of coke delivered to them except in the instance you have named?

A. No, sir.

Q. 34. Excepting the slack used, as you have stated from the large slack pile at one time, was there any difference whatever in the material used by your company in the manufacture of coke from the first that you delivered to Dewey, Vance & Co. prior to the contract throughout your entire delivery under the contract?

A. No, sir.

Q. 35. Was your occupation or your duty such as required you to know or gave you an opportunity to know the quality of the material used?

A. It was.

206 Q. 36. Can you state what degree of care was exercised by your company in the manufacture of coke and the selection of material for its manufacture under the contract as compared with that care which was exercised in the manufacture of the coke which was delivered before the contract was made?

A. We used all the care possible, as it was the desire of the company to give satisfaction and do a large business in coke.

Q. 37. What degree of care was exercised after complaint by Dewey, Vance & Co. was first made, as above stated?

A. If possible an extra degree of care.

Q. 38. Please state what, if anything, was done upon receiving said complaint toward the exercising of greater care.

A. We stopped using the slack from the slack pile, and were instructed to use the very best slack or coal we could get out of the mines for coke; every one interested in getting out the coal or slack and making the coke was instructed to do the best he could.

Q. 39. Were any changes made in the skilled workmen about the manufacture of the coke?

A. Yes, sir; Mr. Van Alen, supposing that our coke burner was not as good as he might be, engaged a regular, and, as I suppose, expert, coke boss from the Connellsville region, who then took charge of the coke making; the new coke boss was employed, as near as I can recollect, immediately after the complaint was made by Dewey, Vance & Co.

Q. 40. What was done with the coke boss who used the slack out of the slack pile?

A. He was discharged from the management of the making of coke.

Q. 41. You speak of the Connellsville region; has that region any celebrity in connection with coke and coke burning?

A. Yes, sir; the coke from the Connellsville region has, I believe, the reputation of being the best coke made, and the bosses and coke burners are consequently considered the very best.

(Objected to on the ground that the witness is stating his belief.)

Q. 42. During the time you delivered coke to Dewey, Vance & Co., subsequent to your employing the new coke boss, who had charge of the burning of the coke delivered to that firm?

A. The new boss, John A. Carothers, who came from Connellsville for that purpose.

207 Q. 43. Where is Connellsville, and how far from your mines?

A. It is in Pennsylvania, about two hundred miles from our mines.

Q. 44. Where is the said John F. Carothers now, if you know?

A. I do not know, never having heard from him since the day he left.

Q. 45. What means have you used to ascertain where he is, if any?

A. I have inquired from two different parties hailing from Connellsville; I have also written to him at Connellsville, and desired Mr. Van Alen to try and hunt him up, as Mr. Morrow wanted to take his deposition in this case.

Q. 46. Did you observe any difference between the coke manufactured by Carothers and that which had been manufactured theretofore at you ovens.

(Objected to because witness has failed to show a competent knowledge of the qualities of coke.)

A. I cannot say that I observed any difference.

Q. 47. What knowledge have you of coke, the different kinds and qualities of coke, and of the conditions or facts upon which its quality will depend?

A. What knowledge I have is derived from being interested in the manufacture of the same by our company during the last seven or eight years and knowing that the coke bearing the greatest burden and being the freest from sulphur is the best.

Q. 48. Does the quality of coke depend more upon the skill used in its manufacture or upon the quality of the material (the slack) from which it is made?

A. It depends more on the material.

Q. 49. Is there anything in the kind of appliances used in its manufacture?

A. Coke is manufactured in pits and in ovens, and the ovens are understood to be the best, ours being manufactured in ovens.

Q. 50. In construction and quality, general adaption for their use, how do the West Fairmont ovens compare with others?

A. I have always heard from those who pretend to be good judges that our ovens are equal to any in the country, if not superior to any in the country.

208 (Objected to, fiirst, as being hearsay; second, because the witness has not shown any knowledge of coke ovens other than those of the defendant in this case.)

Q. 51. Please answer the last question upon your own knowledge of coke ovens.

A. From the best of my knowledge and from the different coke ovens I have seen, the West Fairmont ovens are the best.

Q. 52. What is the extent of your knowledge of coke ovens?

A. I have seen those of Oliver Jackson's, and also those belonging to Carnagel Bros., near Pittsburgh, and examined them closely. I have seen some others, but did not examine them.

Q. 53. Has the company manufactured any coke since you ceased to deliver it to Dewey, Vance & Co?

A. They have; some, I think, immediately after, but not much, and have been manufacturing for the last two or three months?

(Objected to on account of being irrelevant.)

Q. 54. How has the coke manufactured by your company latterly compared in quality with that which you formerly manufactured in 1871, 1872, and 1873?

(Objected to for the same reason that the foregoing question and answer is.)

A. Very favorably; there is no difference.

Q. 55. How has your coke recently manufactured been received in the market?

A. Very well; I have heard of no complaint.

Q. 56. To whom have you sold within the last three months, and in what quantities?

A. Wm. M. Cox & Co., of Chicago, and shipped to St. Louis, and we ship on an average of from two to three cars per day.

All the foregoing questions and answers to questions No. 53 are objected to for the same reason as stated in objection to answer 53.

Q. 57. What was the cause or what were the causes that prevented the West Fairmont Gas Coal Company from completing the delivery to Dewey, Vance & Co. of all the coke contemplated by the contract of October 4, 1872?

A. Orders from Dewey, Vance & Co. to stop shipping coke.

Q. 58. Please state what was the situation of the West Fairmont Gas Coal Company at any and all times since October, 1872, with respect to ability and readiness to supply Dewey, Vance & Co. an average of three car-loads of coke per day according to the contract of October 4, 1872.

209 A. They were always willing and ready and had the ability to supply them with three cars of coke per day.

Q. 59. Do you know the extent of the expenditures incurred by your company in its attempt to establish a trade or demand for its coke?

A. I cannot give the exact figures, but know that it foots up many thousands of dollars.

Q. 60. What effect upon your trade in coke was produced by the refusal of Dewey, Vance & Co. to continue to receive coke under their contract?

A. The effect, I think, was bad. It stopped that much business and gave a bad reputation to the coke, and stopped the manufacture entirely for a good while; in fact we have done nothing amounting to anything since until within the last two or three months.

Q. 61. Were any reasons assigned, so far as you know, by Dewey, Vance & Co. for their refusal to receive more coke (I mean their final refusal, if they made any final refusal)?

A. Not that I know of.

Q. 62. Have you had any oral communication with any member of the firm of Dewey, Vance & Co. on the subject of coke since they discontinued the use of your coke?

A. No; but Mr. Frank J. Hearne came to the mines to see me, but, I being absent, he left a letter on the subject.

Adjourned to June 3, 1880.

Q. 63. Can you produce that letter now?

A. I gave it to Mr. Marr. I have heard Mr. Morrow say that Mr. Hubbard, of Wheeling, had the letter.

Q. 64. It appears from the bill and answer that your company did not deliver to Dewey, Vance & Co. an average of three car-loads of coke per day during the period of time covered either by the contract or by the actual deliveries. Can you state the reason of that?

A. We were stopped from shipping coke upon different occasions by Dewey, Vance & Co.; otherwise I know that we could have kept up the average.

Q. 65. What reasons would they assign for such stoppages?

A. At times none at all, and at others that they were receiving coke too fast.

Q. 66. Please state whether it was in any way attributable to the West Fairmont Gas Coal Company that the full average of three car-loads per day was not delivered?

A. I think not.

210 Cross-examined by WM. H. HEARNE, of counsel for the complainant:

Q. 1. How long and at what time did you first begin your residence at or near Fairmont, W. Va.?

A. In December, 1870.

Q. 2. What was your business on first coming in the above-named State and since that time?

A. First as clerk for the West Fairmont Gas Coal Company and afterward was agent for the West Fairmont Gas Coal Company, and then agent for the West Fairmont and Marion Consolidated Gas Coal Company, which last position I now hold.

Q. 3. What interest have you had and have you now in the above-mentioned companies, dating from December, 1870, up to the present time, other than that mentioned in the previous answer?

A. I am and have been a stockholder in said companies.

Q. 4. Please state when your first coke ovens were built.

A. I think some time in 1871.

Q. 5. Can you not speak more exactly as to the time?

A. Well, they were building during the summer of 1871, as nearly as I can remember.

Q. 6. Have you no data by which you can ascertain when your first coke ovens were built and the number also first erected?

A. I know that the number of ovens first erected were five, and I have data by which I can ascertain the time they were erected.

Q. 7. Will you please get that data?

A. I will.

Q. 8. Please state whether you have not data by which you can ascertain and answer definitely the number of ovens in use by your company before the contract of October 4, 1872, and of those in process of erection, if any, but not completed until after the making of said contract.

A. I think so.

Q. 9. Will you please obtain it?

A. I will if possible.

Q. 10. You state, on your examination-in-chief, that you shipped, prior to October 4, 1872, fifty-seven cars of coke to Hardman, seventy cars to Fitz & Co., two to the Marion Machine Works, and thirty-two cars of coke to Dewey, Vance & Co. Will you please state when these shipments began and the priorities of shipments to the several above-named companies?

211 A. The shipments began December, 1871, with the exception of the Marion Machine Works, which was in March, 1872, and I cannot answer as to the priorities of the shipments now.

Q. 11. Can you not do so by reference to the books of your company?

A. I think possibly I can, and, if so, will; I will do so; and, I may add now, that the shipments to Hardman were made previous to October, 1872.

Q. 12. State in what business Hardman is or was engaged during the time of said shipments, and his place of business.

A. He was manufacturing iron at Hardman's switch, on the B. & O. R. R., in Preston county, W. Va.

Q. 13. Explain more particularly what you mean by the phrase "engaged in manufacturing iron?"

A. I understood that he had a blast furnace.

Q. 14. Please state for what purpose this coke was bought by Hardman.

A. I do not know, but suppose to burn in his furnace.

Q. 15. In what business is E. A. Fitz & Co. engaged, and where is that business carried on?

A. They were engaged in the coal and coke and, I think, grain business, in Columbus, Ohio; the firm has been out of business for some time.

Q. 16. State for what purpose the seventy cars bought by Fitz & Co. were purchased, and how used.

A. I have not the slightest idea.

Q. 17. Have you no means of ascertaining from any data in the possession of your company?

A. I have not.

Q. 18. State where the Marion Machine Works is located and how coke mentioned by you in your examination-in-chief as purchased by said company was used,

A. At Palatine, Marion county, West Virginia; I understood they used it to melt iron.

Q. 19. You state on your examination-in-chief that you received information from George Hardman that the coke made was good; in what manner did you receive such information?

A. My impression is that Mr. Hardman so reported to Mr. Jackson, who was then agent of our company.

Q. 20. Can you state anything further than what has been said in reference to Hardman's report of the goodness of the coke on your examination-in-chief?

212 A. No, sir.

Q. 21. In what manner did you gain your information from the Marion Machine Works of the goodness of the coke?

A. In the same way.

Q. 22. Were not these reports by Hardman and the Marion Machine Company made prior to October 4, 1872?

A. I think they were.

Q. 23. Were they not made during the time, or shortly after the time, that the coke was used by them?

A. I cannot now recollect.

Q. 24. Have you no recollection on the subject?

A. None, except what I have stated.

Q. 25. What is the object in coking coal?

A. It is to make coke.

Q. 26. Why will not coal serve the purpose of coke in the manufacture of iron?

A. I don't know, sir, anything about it.

Q. 27. State, if you know, what peculiar advantage the use of coke has in the manufacture of iron.

A. I do not know.

Q. 28. Can you not state the reason and the object for making coke and the use of the same over coal?

A. Only from hearsay.

Q. 29. Is not the object of coking coal for the manufacture of iron to get rid of the chemically-combined sulphur in the coal?

A. That is the object; so I have understood.

Q. 30. Then you do know the peculiar advantage that coke has over the use of coal in the manufacture of iron?

A. I understand you better now; I think I do.

Q. 31. You state on your examination-in-chief that the coke made after the contract was as good in quality as that made before; please state how you are able to determine this.

A. By being careful to continue the use of coal freest from sulphur and being as careful as possible in the coking of the same.

Q. 32. Is this all that you have to base your knowledge upon in reference to the comparative qualities of the coke made before and after October 4th, 1872?

A. I also looked at the coke from day to day and judged from its appearance.

Q. 33. Please state what that appearance was and how you were able to detect the good qualities of the coke from its appearance.

213 A. Its appearance was bright, and in weight heavy, we understanding that the heavier and brighter the coke the better. We have no other way of judging of its quality.

Q. 34. How long, usually, from the time of the making the coke until it was shipped to Dewey, Vance & Co.?

A. Immediately; except, possibly, when the railroad failed to supply us with cars, or Dewey, Vance & Co. themselves stopped the shipments.

Q. 35. When such exceptions occurred as stated in your last answer where was the coke placed during the time it was waiting shipment?

A. On the coke yards.

Q. 36. Was this an open or covered yard?

A. Open.

Q. 37. When you answer that you think the quality of the coke was as good after the contract as before are you stating your own views or your own views in connection with those of the other officers of the company?

A. Both.

Q. 38. Who was and is the president of the companies mentioned by you since October 4th, 1872?

A. G. R. Van Alen.

Q. 39. Who prior to that time?

A. Mr. Van Alen has always been and is the president of the West Fairmont Gas Coal Company and the West Fairmont and Marion Consolidated Gas Coal Companies.

Q. 40. Will you please look at this letter now handed to you, marked Exhibit "T," and state in whose handwriting it is?

A. G. R. Van Alen, president of the West Fairmont Gas Coal Company.

The plaintiff here offers said letter in evidence.

Q. 41. Please state the names and duties of the several officers of the West Fairmont Gas Coal Company and the consolidated company from December, 1871, to December, 1873.

A. Mr. G. R. Van Alen was president, C. S. Brown was secretary. Oliver Jackson was agent during a part if not all this time.

Q. 42. Please state the particular duties of Mr. Oliver Jackson and the time when he left the service of the defendant.

A. He was agent and had charge of the company's property.

Q. 43. Can you not state more particularly in what that charge consisted; or, in other words, can you not give the particular part of the business that he was charged with?

214 A. The whole of the management of mining and shipping coal, manufacturing and shipping of coke, and the

general management of the business of the company in Fairmont was in his hands.

Q. 44. Can you not state about the time Mr. Jackson left the employ of the company?

A. In the fall of 1872; I think it was in October.

Q. 45. Will you please now state the names and duties of the several men who had charge of the several departments of mining coal and coking the same from December, 1871, to December, 1873?

A. William M. Gaskill was the pit boss during the whole of the time (I mean he had charge of mining), and had charge of the manufacture of the coke until the arrival of the new coke boss, John F. Corothers, who arrived in the early part of 1873.

Q. 46. You speak in your examination-in-chief of your duties being clerical; please state in detail in what those duties consisted during the above-named period.

A. I kept the Fairmont accounts, made out manifests, and any other such work as a general clerk in an office would be supposed to do.

Q. 47. It was not then your duty to see to the mining of the coal or the getting of slack and screenings for the manufacture of coke, nor to attend to the practical making of the coke, and only to see that the cars were properly loaded and that proper measurements of the same — made?

A. It was not my duty to see to the mining of coal and the getting of slack and screenings for the making of coke, nor to attend to the making of the coke. It was my duty to see that the cars were properly loaded and that proper measurements of the same were made.

Q. 49. Have you made the examination you was asked to make this morning?

A. I have. I find that we had five ovens built between August, 1871, and December, 1871. I also find that the last lot of ovens were commenced in April, 1872, as nearly as I can tell, and finished in November of the same year.

Q. 50. How many of these ovens were in operation at the time of making the contract?

A. I should judge, from the fact that they were finished in November, that there was from thirty to forty.

Q. 51. Now, state the actual number of ovens in operation between the fourth day of October, 1872, and December, 1873.

215 A. There were from forty to fifty, I should think.

Q. 52. I now wish to ask you whether there were any ovens started to be built after October 4, 1872, or are we to understand from your previous answer that the erection of all your ovens were begun prior to that time, but not completed until the middle of November, 1872?

A. There were none begun to be built after October 4, 1872; in other words, all the ovens were begun previous to October 4, 1872; some were completed previous to that time, and all the rest that were completed were completed subsequent to that time.

Q. 53. You stated on your examination-in-chief that no complaint

was made of the coke after December, 1872, at which time you were using a part of a large slack pile. Is this simply your own view or are you speaking for the company?

A. I have no recollection of the time the complaint was made about the slack pile, but when I say that I heard no further complaint I speak for myself alone, having no recollection of any other complaints than the one above mentioned.

Q. 54. Will you please look at the letter now handed you, marked Exhibit "F," and state in whose handwriting it is?

A. I don't know positively, but I expect it is in the handwriting of Col. Wilkinson.

The letter is here offered in evidence and comes from the possession of the defendant.

Q. 55. Will you please state from what material the best coke is made without reference being made to mining coal for the purposes of sale and of making coke from slack or screenings of coal?

A. I don't hardly know how to answer that, as I don't hardly understand your question. The best coke, as I understand it, is made from the screenings of coal being the freest from sulphur.

Q. 56. State, if you know, what the *modus operandi* is of coke manufacturers where they make the coke directly and entirely out of the whole coal mined.

A. My understanding is that the coal used at such places is very soft and, consequently, is equal to slack. I know that all men making coke use slack or fine coal, because coarse coal will not make good coke, owing to the draught being much greater, and it is said that burning so much quicker and making coke so much quicker does not carry off the sulphur as well as does a slower fire.

216 Q. 57. In answer to question thirty-one of your examination-in-chief where you were asked, "From what material (I mean what portion of coal) is it customary to manufacture coke?" you replied, from the slack and the screenings. Will you please explain at length what you mean by the slack and screenings and the difference between slack and screenings, if any?

A. There is no difference in slack and screenings. When the coal is dry and our coal customers desire coarse coal we pass the coal over a screen; if, however, the coal is wet we rake it or throw it into the mining cars with what we call a coke fork, the same being quite open, the tines of the fork being some two or three inches apart thereby throwing the coarse coal into the miners' wagon and leaving the slack in the room.

Q. 58. Were you present or did you see the material used in the making of the thirty-two car-loads of coke shipped to Dewey, Vance & Co. prior to the 4th day of October, 1872?

A. Yes, sir; I was there every day and could hardly help seeing it.

Q. 59. Will you state from what coal, whether screenings or slack, the thirty-two car-loads were made?

A. I could not tell you.

Q. 60. Haven't you any recollection on the matter?

A. I have not.

Q. 61. Do you not know that an extraordinary amount of care and that orders were given to have that care exercised in the selection of the material from which the 32 car-loads of coke was made?

A. I know that such orders were given then and that such orders are always given.

Q. 62. Was not this coke made by your company with a view and in reference to the hope of obtaining or making a contract with Dewey, Vance & Co., and was not the best material selected and great care bestowed in the manufacturing of the coke?

A. I do not know that it was especially intended that the coke being made then was for the purpose of making a contract with Dewey, Vance & Co. only, but supposed it was for the purpose of giving the coke a general reputation. I know that orders were given (but that has always been the orders at the mines so far as I know) to use the best material and to take great care in manufacturing the coke. I was neither the mining nor coke boss. I gave orders when received from the president during his absence, after Mr. Jackson left. Mr. Van Alen, as near as I can remember, made fre-
217 quent visits to the mines during the time the said thirty-two cars of coke were being made.

The witness having forgotten to answer a question propounded this morning now answered that there was no coke shipped to Hardman after September, 1872, until 1875; to the Marion Machine Works there was one load shipped in March and another in November, 1872. Fitz & Co. commenced in January, 1872.

Q. 63. Was not Mr. G. R. Van Alen in Wheeling several times during the making of the thirty-two cars of coke with reference to making a contract with Dewey, Vance & Co.?

A. I cannot say particularly, but presume that he was, as he generally went West by the way of Wheeling after visiting the mines.

Q. 64. Where does Mr. Van Alen reside?

A. In Brooklyn, New York.

Q. 65. How long was Mr. Van Alen at the mines at or near Fairmont during the making of the said thirty-two car-loads?

A. I could not tell you; I don't know.

Q. 66. Give your best judgment.

A. My impression is that he generally stayed from one to three days when in Fairmont.

Q. 67. State, as nearly as you can, how many times Mr. Van Alen visited the mines during the making of said thirty-two cars of coke?

A. As the thirty-two cars were made within six weeks I don't suppose he was here more than three or four times.

Q. 68. Who gave the orders for the manufacturing of coke during the visits of Mr. Van Alen to the mines?

A. I presume Mr. Van Alen did to Mr. Jackson.

Q. 69. Who should have given the orders during the absence of Mr. Van Alen during the making of the trial lot?

A. Mr. Jackson.

Q. 70. Please state the name of the coke boss mentioned by you as having been discharged?

A. William M. Gaskill.

Q. 71. At what time and for what reasons was he discharged?

A. About the last of 1872 or first of 1873, about the time the new coke boss took charge, and was discharged from the coke ovens because the company thought the new boss could make better coke; at least that was my understanding.

Q. 72. Do you mean that Gaskill was absolutely discharged
218 from the service of the company or only removed from this position and assigned to another.

A. He was only discharged or removed from the coke ovens, but retained his position as pit boss.

Q. 73. How long was Corothers with you and what was the occasion of his leaving?

A. I do not remember.

Q. 74. Do you remember whether he was discharged or left voluntarily?

A. He was discharged.

Q. 75. For what reason?

A. I think because our coke business was not very brisk.

Q. 76. Was there any other reason?

A. I would not like to say; I think the business was slack and we thought we could get along without him.

Q. 77. What change did Corothers make in the mode of manufacturing coke from Gaskill?

A. I don't know that he made any particular change except as to the burning, in which he was supposed to use his best judgment and experience.

Q. 78. What change did he make in the burning of the coke?

A. I do not know.

Q. 79. Do you know if he made any?

A. Of my own knowledge I do not.

Q. 80. What time did Corothers leave your services?

A. I do not remember.

Q. 81. State your best recollection.

A. I cannot; if I was to be shot I could not tell when he left.

Q. 82. About what time did Dewey, Vance & Co. stop receiving coke from your company?

A. About the last of November, 1873.

Q. 83. What was the condition of the coke market from 1873 on up to within the past two months?

A. I don't know anything about the coke market generally.

Q. 84. Do you not know that in the year 1873 that the price of coke began to fall and that many manufacturers ceased making coke, and have so remained until within a very short time?

A. It seems to me that I did hear some such report.

Q. 85. How long would it have taken your company to have
219 completed the balance of the coke under the contract had they gone on from the latter part of November, 1873, at the average rate of three cars per day?

(Objected to because it is a mere question of arithmetic.)

A. I could not answer without making a proper calculation.

Q. 86. About how long?

A. I could not say.

Q. 87. Do you remember how many cars remained to be delivered under the contract?

A. I do not.

Q. 88. Can you not ascertain?

A. I presume that I could.

Q. 89. Will you please do so?

A. I will if I can; it is one mile and a half to where the company's books are kept and I could not get back before dark, and this is Saturday night.

Q. 90. Did your company ever make any effort to sell coke after Dewey, Vance & Co. refused to take any more under the contract of 1872?

A. That is a question you will have to ask Mr. Van Alen. I presume, however, that they did.

Q. 91. Do you know after the stoppage of Dewey, Vance & Co. of taking the West Fairmont Company's coke of any instance where they were damaged or failed to contract by reason of the refusal of Dewey, Vance & Co. to take the balance of the coke under the contract of 1872?

A. Personally, I do not, but have always been led to believe that it did injure their business.

(Objected to so far as the witness gives his understanding or belief.)

Q. 92. You stated on your examination-in-chief that you received orders from Dewey, Vance & Co. to stop shipping coke, and that it was by reason of such order or orders that said shipments were stopped. Will you please state how these orders were given, whether by letters or otherwise?

A. I think by letter, but whether directed to the mines or to Mr. Van Alen I don't know.

(Plaintiff here objects to all that part of the evidence in chief which refers to the orders stopping the shipping of coke, because it is shown that such orders were given by letters and the letters are the better evidence.)

Adjourned until January 5, 1880.

Witness re-examined by Mr. MORROW:

Q. 1. To what extent, if at all, the different kinds or qualities of coke differ from each other in mere external appearances?

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A. None at all, so far as I can see.

Q. 2. Is it possible for the most expert and skilful judge of coke to tell much about it from the mere external appearances?

A. It is not.

Q. 3. Is there any means, in fact, by which the quality of coke can be ascertained with reference to fitness for the manufacture of iron except actual trial?

A. None that I have ever heard of.

Q. 4. In any communication received from Dewey, Vance & Co. have they ever said anything in regard to the appearance of any coke delivered to them by your company or manufactured at your ovens?

A. They have not in any communication that I have ever seen nor heard, so far as I can recollect.

Q. 5. Does coke sustain any injury or deterioration from the exposure for a short time incurred in the coke yard?

A. I think not, and Mr. Hardman, of Hardman's furnace, told me that it was improved by exposure.

Q. 6. Where is Mr. Hardman now?

A. I am sorry to say he is dead; he has been dead between one and two years.

Q. 7. How far is Hardman's furnace from the Connellsville coke region as compared with Wheeling by rail?

A. About one hundred and twenty miles nearer than Wheeling.

Q. 8. To what extent do the Marion Machine Works use coke?

A. I don't think they use more than two cars per year.

Q. 9. You have said that it was not your duty to examine the slack used in the manufacture of coke. Please state what opportunity you had from day to day of observing the material used and knowing its quality.

A. A very good opportunity, as I was in the habit of going from the office (which is situate on some high ground almost immediately above the mouth of the mines) to all portions of the outside part of the mines several times a day, and in so doing passed the slack cars, and my attention was often called to the same, beside which I naturally took an interest in the manufacture of the coke.

Q. 10 Please state whether the manufacture of coke is one that requires much skill or scientific knowledge?

221 A. No, sir; I do not think that it does.

Q. 11. State, if you please, whether it would be possible to bestow more skill or scientific knowledge upon its manufacture than is possessed by ordinary uneducated laborers who have had some experience in the business of making coke.

A. I do not think it possible so to do.

Q. 12. How long would it require an uneducated and ignorant man who knew nothing about chemically combined sulphur to acquire all the experience necessary to make him a competent coke burner?

A. I think any ordinary man with ordinary judgment would make a good coke maker in a month (I mean with a month's experience).

Q. 13. Do the class of men (now, I mean the whole of them) who are the actual manufacturers of coke possess any scientific knowledge or need any scientific knowledge to qualify them for first-class manufacturers?

A. No, sir; they do not.

Q. 14. I now ask you whether the material used in the manufacture of the thirty-two car-loads of coke referred to in the fifty-

nine and subsequent questions and answers in your cross-examination differed in any respect *to* the material used in the manufacture of other coke delivered to Dewey, Vance & Co., not including that made from the old slack pile.

A. No, sir; it did not.

Q. 15. Please state what degree of care was exercised in the selection of material and in attention to the whole manufacture of the coke last above referred to as compared with the care and pains and skill bestowed on that thirty-two car-loads?

A. Orders were continually given to use all the care possible in the selection of material as well as the burning, as it was desirous to have and to make as good coke as it was possible for us to make.

Q. 16. Can you state how those orders were executed (I refer to the orders you mentioned in your last answer)?

A. To the very letter, I think, as everybody about the place were naturally interested in establishing a good coke business.

Q. 17. Can you state why the Marion Machine Works and why George Hardman discontinued the use of your coke? And state particularly if either of those parties complained of the quality of the coke.

A. If they complained of the quality I never heard it, but
222 don't think they did; but I heard in some way that Hardman could buy cheaper.

Q. 18. Have you any knowledge, either personal or derived from Dewey, Vance & Co., in relation to the mode in which they used the coke delivered to them prior to the making of the contract or how they proposed to use that contemplated by the contract—I mean whether exclusively or in combination with other coke?

A. I have heard Mr. Van Alen say——. I have none; nor derived from Dewey, Vance & Co.

Q. 19. Referring to your answer to the ninety-second question in your cross-examination, do you there refer to any final order of Dewey, Vance & Co. or to orders that were given from time to time, as their supply would accumulate too greatly?

A. I refer to orders given from time to time.

And further this deponent saith not.

C. M. DAVISON.

OLIVER JACKSON, another witness of lawful age, being by me duly sworn, upon oath deposes and says as follows:

Q. 1. Please state where you reside and what connection you have had, if any, with the coal business and coke manufacturing.

A. I reside in Fairmont and have been connected with the coal and coke business for a number of years near Fairmont.

Q. 2. How near the mines of the West Fairmont Gas Coal Company's mines?

A. About a mile.

Q. 3. Have you been mining coal and manufacturing coke from the same stratum as that which has been used by the West Fairmont Gas Coal Company?

A. I have exclusively, because I believe there is no other.

Q. 4. Were you in the employ of the West Fairmont Gas Coal Company at any time in the year 1872? If so, please state when and how long.

A. I was in the employ of the West Fairmont Gas Coal Company until the 1st day of November, 1872.

Q. 5. Do you know anything in regard to thirty-two car-loads of coke or thereabouts delivered by that company to Dewey, Vance & Co. prior to the 4th of October, 1872?

A. I know that we burnt coke and shipped it prior to that time, but I doubt exactly the number of cars.

Q. 6. Did you have any duties in relation to the coke; if so, what?

223 A. I had the general supervision of the mining of the coal shipped at West Fairmont and the coke burned and shipped from the ovens at West Fairmont at that time.

Q. 7. Do you remember that subsequent to October 4, 1872, some slack was taken from an old slack pile and used in the manufacture of coke?

A. All the knowledge I have of it was seeing them using it for that purpose as I passed by casually. It was after I left there. Probably there was a small amount used before the 1st of November, but it was a very small amount.

Q. 8. Except that used from the old slack pile, what kind of material was used in the manufacture of coke by the West Fairmont Gas Coal Company in the years 1872 and 1873, so far as your knowledge of the material extends?

A. The coal we used for burning coke was the screenings taken from the run of the mines. The screenings is the small fractures of coal; the fine coal.

Q. 9. What kind of material is used by coke manufacturers generally?

A. In this locality we are using as much as possible the screenings, and when we haven't a sufficient quantity of that we mine the coal and break it up. We prefer fine coal; the finer the better, so it is not in dust.

Q. 10. Did you have opportunity of observing the coke manufactured at the West Fairmont mines in the year 1873; what material was used; what care in its selection, and what quality of coke was produced?

A. I took no special observation, only as I passed by occasionally. I gave it no special attention after I left there.

Objected to because he has stated that he did not have any special opportunity and did not give it any special attention.

I supposed they were burning coke in the ordinary way and exercising the ordinary care in the usual way that it had been done theretofore. I don't know that there was anything about the coke than had been theretofore.

Q. 11. I believe you are manufacturing coke at this time within a mile of the West Fairmont mines; is that true?

A. Yes, sir.

Q. 12. Now, I ask you to state whether the coke manufactured from that stratum of coal is of a quality fit for use in the manufacture of iron unmixed with coke of a better quality?

A. I can't answer that question just as you have got it there. I will answer in this way: I am shipping the coke which I
224 am making now to St. Louis, Missouri. The party to whom I am shipping seems to be well pleased with the coke, and asks me to ship all that I can; the more the better, is his language.

Q. 13. You leave the question wholly unanswered.

A. In some instances it is considered very good for the manufacturing of iron. In Wheeling some parties there have stated to me who have used the coke that they see no reason why a portion of our coke might not be used with Connellsville coke to a good advantage.

(So much of the next two previous answers as sets forth what was stated to the witness by others is objected to as being hearsay.)

Q. 14. Were the parties you refer to concerned in the manufacture of iron?

A. They were, sir.

(Objected to for the same reason as the two previous answers.)

Q. 15. Now, I ask you if the same kind of material be used and the same method of manufacture be pursued will there be any difference in the quality of coke produced.

A. I should think not.

Q. 16. In other words, upon what does the quality of coke chiefly or wholly depend?

A. It depends upon the freeness of the coal from sulphur (on the quality of the coal), if it is coked properly, and there is no trouble in coking it, as it is a process of its own pretty much.

Q. 17. What quality of ovens were used by the West Fairmont Gas Coal Company?

A. They were good. They are very good compared with others. They are made after the same style of those in the Connellsville regions. They are very good ovens.

Q. 18. Is there anything in the process of coking the coal by which the purity or excellency of the coke can be increased beyond that purely natural process which takes place in the coking itself, independent, I mean, of artificial means?

A. There is nothing that I know of.

Q. 19. For example, is there any artificial method resorted to by the best coke manufacturers, any method beyond the process of coking, by which the deleterious qualities of the coal are expelled, the sulphur or the phosphorus?

A. There is no process that I know of after the coal goes into the oven, except the burning it, that is used in this section any way.
225 Q. 20. If the West Fairmont Gas Coal Company used the same kind of screenings in 1873 that was used prior to No-

vember, 1872, and coked it in the same ovens until it was thoroughly coked, could there have been any difference in the coke produced at the one period of time from that produced at the other?

A. I don't see that there could be any difference, all things being equal.

Q. 21. Could the most skillful coke burner or the most unskillful produce two different qualities of coke from the very same qualities of material, pursuing the same method of manufacture in each case?

A. I don't see that there could be any difference if the same method and the same material was used.

Q. 22. What degree of skill does it require to manufacture coke, and how long does it take to acquire the necessary skill?

A. Really there is no special skill in the manufacture of coke, and what little knowledge is required to burn coke can be acquired in a short time—in a day or so of time; in one day's time.

Q. 23. Does it require any scientific knowledge whatever?

A. I think not specially so.

Q. 24. Is there any way by which the quality of coke (I mean its fitness for the manufacture of iron) can be ascertained except by actual experiment?

A. I reckon that is the best test.

Q. 25. Can you tell from mere external appearance whether coke is exempt from sulphur and phosphorous or not?

A. No, sir; you can't tell from the looks of it.

Q. 26. Judging by external appearance what kind of coke did the West Fairmont Gas Coal Company produce (I mean how did it compare with the very best Connellsville coke in looks)?

A. The coke looked very well and in looks it compares favorably with Connellsville coke.

Q. 27. In the manufacture of coke is there anything that could be done in the process of coking by even the most careless and ignorant coke boss or coke burner that could deteriorate the quality of the coke?

A. Treating the process in the same manner, I don see that there is.

Adjourned to January 6, 1880.

226 Witness cross-examined by Mr. HEARNE:

Q. 1. Please state again at what time you left the service of the West Fairmont Gas Coal Company.

A. On the last day of October, 1872, I think was the time.

Q. 2. What business did you then follow and how soon after you left the employ of the West Fairmont Gas Coal Company?

A. I prepared to open a coal mine; commenced mining and shipping coal and making coke on my own account.

Q. 3. When did you first take steps to open your coal mine and to manufacture coke?

A. My books show that I commenced to work on the 21st day of October, 1872, while I was in the employ of the West Fairmont Gas Coal Company.

Q. 4. Do you mean that your first preparation was made then, or do you mean that your ovens and coal mine were in operation on the 21st of October, 1872?

A. I mean I commenced to open my coal mines and construct my coke ovens on the 21st day of October, 1872, or about that time.

Q. 5. Were you not employed for some time prior to the 31st of October, 1872, in collecting materials and getting labor or, in other words, making a general preparation preparatory to the construction of your coke ovens?

A. No, sir; I was not.

Q. 6. How often were you present at the Fairmont mines prior to October 21st and after October 21st, confining your answer to the month of October, 1872?

A. So far as I recollect now, I was there every day except on the Sabbath.

Q. 7. Do you mean to say that after the 21st day of October that you were exercising the same active supervision at the West Fairmont Gas Coal Company's works as before?

A. Well, in the main I was.

Q. 8. What do you mean by "in the main I was?"

A. I mean by that that I was general superintendent of the entire works.

Q. 9. How are your works located, with reference to the West Fairmont Gas Coal Company's?

A. I reckon they are about one-fourth of a mile distant from my works.

Q. 10. How often since leaving the employ of the West Fairmont Gas Coal Company have you been in that company's mines?

227 A. I have not been in their mines since I left their employ.

Q. 11. How often did you visit those mines whilst in their employ?

A. When I could be I was always there once a day at least.

Q. 12. What was the purpose and object in visiting the mines?

A. To see that business went on correctly, according to general instructions given.

Q. 13. Can't you state in detail what the general instructions were?

A. Well, that would be a very difficult question to answer in that shape. To see that the coal was mined and that everything was kept in order; that there should be no delay in the loading of coke, and general attention that was necessary to give a work of that kind.

Q. 14. Wasn't it, in other words, your purpose to see that proper care was exercised in getting out the coal and the proper amounts of the same, and, in a word, to the general supervision of the mines?

A. Yes, sir; I had the general supervision of the mines.

Q. 15. How often did you visit the works of the West Fairmont Gas Coal Company up to and including the year 1873?

A. That would be a very hard question to answer, because I kept no account of the time; but I was not there very often, and when I

did go there it was on business and not for the purpose of examining their work.

Q. 16. How far apart were these visits, according to the best of your recollection?

A. I had no special time for visiting; sometimes it was longer and some shorter. I only went on business.

Q. 17. State, if you can, about how long it was between some of those visits.

A. Well, I can't do that, for the reason I don't recollect. Whenever I had business I went. It might have been a day, a week, or two weeks apart.

Q. 18. Were there not times at which a period of at least two months elapsed between your visits?

A. I don't think there was that long a time at any time during 1873 but what I was there.

Q. 19. Did you examine, on those occasions, the material from which the coke was made, or the coke, particularly?

A. Not particularly; I don't know that I gave it any special attention.

Q. 20. In other words, then, it was only a passing notice whilst you were on your way to attend to other business?

228 A. Yes; that is about all the attention I gave it—general observation.

Q. 21. Do you, then, really know from what the coke was manufactured after your leaving the company and during the year 1873—that is, the quality of the material used?

A. I gave the material no special attention, for the reason that I was not interested in the work at that time.

Q. 22. Will you now please state what effect the exposure of coke to weather has upon it as to showing sulphur?

A. It spots the coke.

Q. 23. Will not long exposure of coke to weather bring the sulphur out on the surface if the sulphur is in the coke?

A. Exposure has the tendency to color the coke and show whether there is sulphur in it or not.

Q. 24. Do you know what care or is it only a supposition on your part that the same care was used after as before leaving the employ of the company?

A. It is only supposition on my part. I suppose they used the same care; they ought to, at any rate.

(All of the witness' evidence, so far as it relates to the care used in the manufacture of the coke, is objected to so far as it has reference to care used after he had left the employ of the company.)

Q. 25. Do you know what method was pursued in the manufacture of the coke after your leaving the company?

A. No, sir; I don't, more than I suppose it was the general process.

Q. 26. You speak on your examination-in-chief of manufacturing and selling coke to parties in St. Louis; can you state for what purpose that coke is used?

A. No, sir; I cannot; all I know about — is that I ship it to parties in St. Louis.

Q. 27. Why is it an object to persons mining and selling coal at or near Fairmont to have coke ovens?

A. For the reason that it is a source of profit.

Q. 28. How does it become a source of profit and what particular fact justifies coal dealers in engaging in it?

A. In the first place, we can mine coal and burn it into coke and make a profit; and, again, we can run our coal over a screen from the mine, put our coal for the trade in a better condition for sale, and use the small coal for coke.

Q. 29. Is it not, then, in other words, justified by the fact that you can utilize a large portion of material that would otherwise become waste?

229 A. That depends upon the trade that you have for your coal.

Q. 30. Does it not, then, depend largely upon the amount of your coal trade and the character of that trade as to the extent of the screenings or slack that you will have?

A. I can adapt my screen to give me more or less slack as I desire.

Q. 31. But, after all, the screenings or slack does not reach beyond a certain size?

A. That depends upon the size of the most of the screen that the coal runs over.

Q. 32. Please state what is the character or size of the screenings that coal dealers usually reserve for coke.

A. The character of the coal is the run or average of the mine; the size is adapted according to the mesh of the screen which the coal runs over.

Q. 33. What size coal do these screens usually let pass through?

A. My screen bars, I use from one-half an inch to one and one-half inches apart, and the coal passing through those bars run from one and one-half inches down to dust.

Q. 39. Now, will you please state, where coal dealers and manufacturers of coke have not a sufficient supply of screenings to run their ovens, to what source are they compelled to resort to make up the deficiency?

A. In the sense of mining coal and parties who mine for cooking purposes, when they run short of the fine coal or screenings, as we term it, they resort to the mines and mine coal for that purpose, and this coal so mined has to be prepared for that purpose by mining it fine.

Q. 40. Now, will you please state how many of the ovens of the West Fairmont Gas Coal Company, which they now have or have at any time had, were in operation when you left the service of the company?

A. If I am not mistaken, there were about forty to forty-nine ovens in operation when I left, and two or three were there that were not then completed. There was possibly one completed after I left.

Q. 41. Were you able at the time that you left the service of the company to manufacture the coke from the screenings without mining the coal specially for the purpose of manufacturing coke?

A. I had sufficient amount of material, so far as I recollect,
230 from the mine and the screen to run the ovens—that is, I used some of the finer portion of the coal mined and the screenings, which afforded my supply for the ovens.

Q. 42. Do you know, as a matter of fact, whether the coal trade of the West Fairmont Gas Coal Company was increased or lessened after you left the employ of the company?

A. I think their trade has increased.

Q. 43. Had it increased during 1873?

A. My impression is now that it was fully up to what it was when I left there.

Q. 44. What do you regard as the safest and the best test of the quality of coke for the manufacture of iron?

A. The actual use of coke I should think the best test.

Q. 45. Is it not, in fact, the only test?

A. Well, if there is any truth in analysis, I should'nt think it was the only test.

Q. 46. Outside of analysis?

A. I don't know that it is. There is a good many ways that a man can test the qualities of coke and coal.

Q. 47. Will you please state any other tests you know of?

A. I suppose you could test the qualities of coal and coke for the manufacture of iron in blacksmiths' forges.

Re-examined by Mr. MORROW:

Q. 1. If you know of any other matter not already stated which would be of advantage to the West Fairmont Gas Coal Company in this cause, please state it fully.

A. As a matter of course, I have no information that I know would be of advantage to the West Fairmont Gas Coal Company, for this is a matter in which I do not know what would be of advantage to that company and what would not be of advantage to it.

And further this deponent says not.

O. JACKSON.

231 *Depositions Taken at Wheeling, May* 3, 1880.

Present: James Morrow, Jr., for defendants; H. M. Russell and Mr. W. H. Hearne, for complainant.

G. R. VAN ALEN, a witness of lawful age, being first duly sworn by me, deposes and says as follows:

Q. 1. Where do you reside?

A. Brooklyn, Kings county, State of New York.

Q. 1½. What relation did you sustain to the West Fairmont Gas Coal Company?

A. I was elected president when the company was organized in 1870, and remained its president till it was consolidated with the

Marion Gas Coal and Coke Company, now styled the West Fairmont and Marion Consolidated Gas Coal Company, of which I am now president, and I am still president of the West Fairmont Gas Coal Company, so far as it has any existence.

Q. 2. Has the said West Fairmont Gas Coal Company now any assets since its consolidation with the Marion, or does it conduct any business?

A. No.

Q. 3. Where is the property of your company located?

A. At Fairmont, Marion county, W. Va.

Q. 4. What does it consist of?

A. Of about six hundred acres of coal land, and about one hundred of which we own the surface, upon which are a number of houses and buildings of various sorts, steam engines, dumps, dump-houses, and general equipment necessary for mining and shipping coal.

232 Q. 5. At what time did the West Fairmont Gas Coal Company first engage in the manufacture of coke?

A. It was in December, I think, of 1871.

Q. 6. At that time had any coke been manufactured from the coal vein owned and worked by that company?

A. No coke had been manufactured previous to that time from that coal vein.

Q. 7. How is Fairmont located—I mean on what stream?

A. On the Monongahela river, a mile or two below the junction of the Tygart Valley and West Fork rivers.

Q. 8. How far from the mouth of the Monongahela river?

A. About one hundred miles.

Q. 9. So far as you know, had any coke ever been manufactured from the coal lying along the valley of the Monongahela river until your company commenced the manufacture at the time you have stated above?

A. I have no knowledge of any coke ever being made with the exception of once, having heard that there was some made for some man in Wheeling.

Q. 10. Was any such coke known to the trade as coke manufactured from the coal deposit of the Monongahela Valley?

Objected to as leading.

A. Not that I am aware of.

Q. 11. What knowledge did you have or did your company have of the coking qualities of your coal before you commenced the manufacture of coke at your West Fairmont mines?

A. Very little, and what little we did have was derived from Mr. Jackson; he stated that that coal would make good coke.

Q. 12. Did he state as a matter of knowledge or as a matter of opinion?

Objected to on the ground that the only proper question to get the information sought is a question calling for the conversation.

A. I received it as a matter of opinion.

Q. 13. Had Mr. Jackson or any person else, so far as you know, ever engaged in the manufacture of coke from the coal deposit of the Monongahela Valley?

Objected to as leading.

A. No, sir.

Q. 14. What knowledge you or any person belonging to your company or other persons, so far as you know, had in regard to the quality of coke which might be manufactured and produced from coal mined at Fairmont?

233 A. No positive knowledge.

Q. 15. Had you any that was not positive?

A. Well, some representations of Mr. Jackson's.

Q. 16. What were they?

A. He said the coal would make good coke.

Q. 17. What opportunities had he had more than yourself or others of knowing anything about that subject?

A. He claimed to have a knowledge or been engaged in mining elsewhere.

Q. 18. What relation is there between mining and the quality of coke?

A. Getting the coal fine enough and rejecting slate and impurities.

Q. 19. Do you recollect the time and circumstances of the making of the contract with Dewey, Vance & Co., mentioned in the pleadings of this cause?

A. I do.

Q. 20. At the date of said contract how much coke had been manufactured at your mines at Fairmont?

A. I don't know definitely; I think between sixty and one hundred car-loads.

Q. 21. By whom had coke of your manufacture been used prior to the making of said contract?

A. Hardman's furnace near Grafton; Marion Machine Works, Palatine; E. A. Fitch & Co., Columbus, Ohio. That is all positive that I can give; also, Dewey, Vance & Co., of Wheeling.

Q. 22. To what extent had it been used by these parties prior to the making of the contract?

A. Hardman had been having it every week on an average; Marion Machine Company had a couple of car-loads; Fitch & Co. had a good many at irregular intervals; Dewey, Vance & Co. had, I think, between thirty and forty.

Q. 23. Which of these parties have had the greatest quantity?

A. Hardman, Fitch & Co. and Dewey, Vance & Co. have each of them had so near a like a quantity that I don't know.

Q. 24. Prior to the making of said contract had you received any information from Dewey, Vance & Co. in regard to the quality of the coke or its adaptation to the making of iron? (When I say "you" in this examination I mean the West Fairmont Gas Coal Company).

A. I had.

234 Q. 25. Please state what that information was, and from whom it was received.

A. It was that the coke would answer to use in connection with other coke—Connellsville coke—at their furnace. The information was from Mr. Hearne, Sr., and I think there was a letter from the firm of Dewey, Vance & Co. relative to that.

Q. 26. Can you state which of the Messrs. Hearne gave you this information, and when and where it was given?

A. The elder Mr. Hearne, Wm. L. Hearne, and at the office of Dewey, Vance & Co., in Wheeling, a few days prior to the 4th of October, 1872.

Q. 27. Please state whether you conversed with any other member of the firm on the same subject.

A. I cannot state positively.

Q. 28. Where was the oral contract made or conversation had which is referred to in the letter of Dewey, Vance & Co., dated October 7, 1872, filed with complainant's depositions in this case, marked Exhibit "Z?"

A. In the office of Dewey, Vance & Co., Wheeling, on the 4th of October, 1872, between the hours of half after ten or eleven and half after one, with Mr. Wm. L. Hearne and Col. N. Wilkinson.

Q. 29. Was that the conversation in which Mr. Hearne gave you the information you have detailed?

A. Not wholly; only partially.

Q. 30. If you had different conversations with Mr. W. L. Hearne in regard to the quality of the coke, please state how many and what was the purport of them?

A. Two, three days, or possibly four, prior to the 4th of October I stopped at Wheeling, on my way to Columbus, Ohio, and saw several members of the firm—Col. Wilkinson and, I think, Mr. Hearne—and we had some talk about coke. The details of that conversation have escaped my memory, but the talk was favorable to the coke, and they were ready to make a contract, or would be in a few days, for it.

Q. 31. Please state, if you can remember, what those parties or any of them said of your coke in comparison with Connellsville coke.

A. All that I know is that I did not claim that it was equal to Connellsville, and they did not admit that it was—that is, Connellsville coke had less sulphur than ours, but our coke was more dense,
235 and I claimed that it would carry a heavier burthen and give a stronger and quicker blast, which was partially assented to or acquiesced in.

Q. 32. You have said that they or Mr. Hearne stated that your coke could be used in the manufacture of iron in combination with Connellsville coke; did he or they say in what proportion it could be so used?

A. The talk was one-quarter to one-third of the coke to be put in the furnace; they did not know whether it would answer to put a greater proportion in or not, but the previous proportions were considered safe.

Q. 33. Did any other officer or agent of your company participate in the making of said contract or in the negotiations which preceded it?

A. No other officer or agent participated. Mr. Jackson had received a letter previous to this time from Dewey, Vance & Co. relative to the coke.

Q. 34. Now, please state whether you made any representations to said firm in regard to the quality of your coke or its fitness for the manufacture of iron; and, if so, what such representations were.

A. I stated, as near as I know, the correct qualities of the coke, admitting that it had more sulphur than the Connellsville coke, but claiming that it had a superiority with regard to blast and burthen.

Q. 35. At that time had you received any information from any of the other consumers of your coke, mentioned above, in regard to its quality and fitness for the making of iron?

(Objected to and answer not insisted on.)

Q. 36. Had you any other knowledge in regard to the fitness for the manufacture of iron of your coke than that which you had obtained from Dewey, Vance & Co., above stated by you?

A. Indirectly I had.

Q. 37. Had you any upon which you could make or did make any representation as to its quality?

A. I had.

Q. 38. How did such other knowledge as you had acquired, indirectly as you said, correspond with the representations made by Dewey, Vance & Co. in regard to the quality of your coke in the manufacture of iron?

(Objected to.)

A. It was very similar.

Q. 39. Prior to the time of making said contract and at
236 the time it was made had the West Fairmont Gas Coal Company or any of its officers or agents had any means of knowing the actual quality of the coke and its actual fitness for the manufacture of iron other than that which they had obtained from the consumers named above who had used it?

A. None.

Q. 40. Prior to the making of said contract what preparation had your company for the manufacture of coke?

A. We had five ovens that were put in blast in December, 1871; seven additional ovens were fired on the 7th August, 1872; and I left Fairmont on the 14th of August; and then there were twenty fired up; and there were twenty-three additional to the first five finished; the front wall was up at that time for twenty-nine and one-half ovens.

Q. 41. What was the company's producing capacity per day at the time the contract was entered into?

A. I should think about 20 cars per week, and I think a little in excess of that.

Q. 42. Please state when complaint first reached you of the quality of this coke delivered under this contract.

A. I have no recollection as to that, excepting the letters which are filed in this case.

Q. 43. Please state what knowledge you have of the quality of the coke manufactured and delivered by your company to Dewey, Vance & Co. under this contract, and especially as compared in quality with that which was delivered to them antecedently.

A. The coke was manufactured after the contract the same as before, with the exception of some slack taken by Mr. Gaskell while Mr. Jackson was manager, latter part of October, 1872, when they run short of screenings and commenced taking a few loads daily from the slack pile. I was at the mines from July 19th to August 14th, September 6th to 13th, and a portion of the time from September 26th to October 7th or 8th, and October 30th to November 13th, and from December 15th to 17th—all in the year 1872; and, with the exception noted, it was made just as good as we could make it; it had every appearance of being the same as formerly, and every care was exercised in its manufacture. Gaskell took the coal from the slack heap during my absence in New York, and, as Mr. Jackson was then manager, I presume by his direction; but then I had nothing to do with the taking of the coal from the slack heap until I went out there and asked them how they got coal
237 enough for the ovens. They told me they were taking a few wagon-loads from the slack heap and that it answered every purpose and was just as good as the fresh slack out of the mine. Further, I would state that the slack heap was a great deal of it fresh dumped or dumped comparatively within a recent period. Furthermore, that at that time I had no knowledge but what slack that had been long mined was just as good to make coke out of as that which had been mined recently.

Q. 44. Can you state when the use of that old slack was discontinued?

A. As soon as Mr. Hearne advised it. Mr. Wm. L. Hearne visited the mines on or about the 12th of December, 1872, and he saw or was informed that they were using some of that slack in the manufacture of coke and claimed that it deteriorated the quality and we stopped using it immediately.

Q. 45. From the time the use of that slack was discontinued so long as Dewey, Vance & Co. continued to receive coke from your company what was the quality of the coke delivered to them and how did it compare in quality with that which was delivered before the contract was made?

A. It was as good as we could make from our coal and equal to any that had been delivered.

Q. 46. Please state from your knowledge of the manufacture of coke whether it would be possible to manufacture from that coal at Fairmont a better quality of coke better fitted for the manufacture of iron than that which was delivered by your company after the use of that slack pile had been discontinued.

Objected to.

A. As we took special pains to get a coke boss from Connellsville and took every pains in the manufacture ourselves I don't think that any better coke could be manufactured from that coal, except by washing the coal previous to the making of coke.

Q. 47. Is that ever done by coke manufacturers?

A. Yes.

Q. 48. Where?

A. Carpenter's station, in Pennsylvania.

Q. 49. Was the coal washed from which the coke was manufactured that your company delivered to Dewey, Vance & Co. prior to the making of said contract?

A. No, sir.

Q. 50. Was their any difference either in the material used or in the method of manufacture between the coke referred to
238 in the last question above and that which was manufactured and delivered to Dewey, Vance & Co. after the 13th December, 1872?

A. None, only that we took more pains after that than we ever did before.

Q. 51. In what respect did you take more pains?

A. We were more careful to have the coal which we used unexceptionable; likewise in the burning.

Q. 52. How about the selection and employment of persons skilled or otherwise in the manufacture of coke?

A. They found so much fault with our coke that we thought, perhaps, a professional coke boss from Connellsville might improve the quality of our coke; therefore I went to Connellsville and got one.

Q. 53. Where is he now?

A. I don't know; I have tried, but can't find out.

Recess until 2 p. m.

Q. 54. After you had employed the professional coke boss was any further complaint made by the firm of Dewey, Vance & Co. in regard to the quality of the coke? If so, please state when and how.

A. There were faults found; the best answer I can make is to refer to their letters.

Q. 55. Were all the complaints, so far as you have a knowledge of them, communicated to your company in writing—that is, do you mean by your last answer that all their complaints are contained in the letters filed in this cause?

A. No; I do not; I should have been at Wheeling in February, 1873, but I don't know whether I was or not; likewise, in July or August, 1873, and when at Wheeling I had talks with Mr. Hearne about it; he found fault with the coke; said they could not use it largely to advantage, and, apparently, it was no better than before we employed the Connellsville coke boss.

Q. 56. How is the quality of coke ascertained?

A. In various ways; analyzation of what it is composed or what it contains and practical tests for the purpose you want to use it;

then there is the ordinary method of picking up a piece and examining it to see whether you can detect any impurities.

Q. 57. Would it be practical to analyze large quanties or even considerable quantities, such as car-loads?

A. No.

239 Q. 58. Is there any reliable method, and also practical, of ascertaining the fitness of coke for the manufacture of iron, except a trial or test by using a quantity of it for that purpose?

A. I should say there was.

Q. 59. What is it?

A. A number of analyzations of different kinds would establish very thoroughly.

Q. 60. Prior to the making of said contract had your coke been subjected to repeated analyses for the purpose of ascertaining its quality?

A. Not at all; never had been analyzed.

Q. 61. So far as the quality of coke can be ascertained by inspection, how did the coke delivered by your company subsequent to the 13th day of December, 1872, compare with that which had been delivered to Dewey, Vance & Co. prior to making of said contract?

A. On examination you could detect no difference.

Q. 62. So far as appearance is concerned, how did the said coke compare with coke generally?

A. It was as silvery white and as handsome as any coke you could find anywhere.

Q. 63. During the time you were delivering coke to Dewey, Vance & Co. under said contract were you manufacturing coke for any other consumer or delivering to any other?

A. We sold coke to various parties; I cannot tell positively who had from us during that specific time, but I know that others did have at various times. I have no record with me of the transaction.

Q. 64. Please state at what time the said firm of Dewey, Vance & Co. ceased to receive coke from your company?

A. I think in November, 1873.

Q. 65. Can you state the reason why your company never resumed shipments of coke to the said firm of Dewey, Vance & Co.?

A. Yes; because they would not receive it; they told us not — ship it.

Q. 67. Please state what the situation of your company was from the time said contract was entered into thenceforth with respect to its ability and readiness, or otherwise, to deliver to said firm of Dewey, Vance & Co. coke in the quantities and of the quality contemplated by said contract?

A. It always had the ability to deliver that quantity of coke, to wit, three cars per day, until from use of the ovens for two or three years they got out of order and it then would have been

240 a very short job for us to put them in order for a delivery of that quantity; we were ready and anxious and urged them repeatedly to take the quantity of coke called for by the contract, and even suggested that it should be taken in such quantities as

might suit their convenience regardless of the length of time that it might require to complete the delivery under the contract.

Q. 68. It is to be observed that whilst the contract requires you to deliver on an average three car-loads per day you do not seem to have delivered nearly so much as that on a daily average; can you state what was the reason that the deliveries were not made as rapidly as the contract requires?

A. Because Dewey, Vance & Co. requested us not to.

Q. 69. Was there any other reason?

A. Not that I know of.

Q. 70. Please state whether, so far as you know, your company had any interest which could possibly be subserved by permitting the quality of its production of coke to suffer deterioration?

Objected to.

A. On the contrary; our interest was to make the best coke we possibly could.

Q. 71. How were the profits to be derived from coal manufactured into coke compared with the profits arising from the sale of coal?

Objected to.

A. The profits on coke were larger at that time than they were on coal.

Q. 72. What would have been the clear profit to your company upon the said contract if the whole quantity of coke had been received within the time limited by the contract?

Objected to on the ground that the question does not suggest any proper method of measuring the damages.

A. Between fifteen and twenty thousand dollars; I would not have taken fifteen thousand dollars cash for that contract when I left Dewey, Vance & Co.'s office without thinking over it a good many times.

Q. 73. By what means do you arrive at the conclusion above stated by you?

A. By the profit on the coke previously manufactured.

Q. 74. Please state whether your company did in fact obtain a market for its coke, and whether any effort was made to obtain a market after the refusal of Dewey, Vance & Co. to receive it according to contract.

241 (Objected to.)

A. Previous to making a contract with Dewey, Vance & Co. it seemed as if everybody wanted coke, and the opportunities to sell were very great. After they reduced our shipments it was very difficult to find a market for our product, and in consequence of their reducing their orders we never fired up a number of our ovens.

Q. 75. To what extent was your company engaged in manufacturing coke after the firm of Dewey, Vance & Co. ceased to receive?

A. The demand gradually declined until we had no orders and had to stop the manufacturing of it.

Q. 78. Do you know of any means by which your company could have diminished the losses that you claim it sustained by reason of the failure of said firm of Dewey, Vance & Co. to receive and pay for the coke contemplated by said contract?

(Objected to.)

A. Our capacity was equal to the delivery of all the coke called for by that contract and all the coke that was sold besides; hence we could not retrieve the loss occasioned by their failure to take that coke.

Q. 79. Was there anything in the then condition of the iron manufacture which affected the demand for coke? I mean both at the time that the contract was made and some months subsequent.

A. The iron market commenced to decline soon after the making of the contract that is shown by the exhibit filed with the deposition of Dewey, Vance & Co.

Q. 80. Referring to the testimony of the witness, William Gaskell, taken in this cause, please state whether you ever gave him directions to use slack from the slack pile mentioned by him and by you in your evidence above.

A. No, sir; I did not; but he told me that he was taking a little from the pile and I did not tell him to stop it because he said it was just as good as the other coal, and I thought a few wagon-loads a day would not affect the quality of coke we were making, and we, none of us, knew that slack that had been some little time out of the mines was injured by exposure to the weather.

Q. 81. Do you now know whether in point of fact slack suffers any deterioration by being exposed to the weather or whether it would be rendered less impure?

242 A. Only from the representations of Messrs. Dewey, Vance & Co. relative to the coke that was made where a portion of that slack was used.

Q. 82. What were the causes, as briefly as you can state them, which induced the consolidation of the West Fairmont Gas Coal Company with the Marion Gas Coal and Coke Company, forming the West Fairmont and Marion Consolidated Gas Coal Company?

A. The coal lands of the two companies adjoined each other and we were in direct competition sometimes, and some of the West Fairmont's largest stockholders were the largest stockholders in the Marion, and it was thought that consolidation would obviate or remove conflicting interests.

Q. 83. Had the said consolidation and the conveyance of the property of the West Fairmont company to the new company any reference to this controversy or to any creditor of the West Fairmont company?

(Objected to.)

A. Not the slightest; it was never thought of. Both companies, and particularly the West Fairmont, were in a very prosperous

condition, and the reasons for consolidation were as I have previously stated.

Q. 84. Had either of said companies any creditor at the time said consolidation was affected?

(Objected to.)

A. They had. There was a small incumbrance on the property of the West Fairmont, I think about $2,400 or $2,500, and the Marion owed some money on contracts for purchase of the property; likewise they owed some for machinery; but at the time of the consolidation the West Fairmont had $20,000 or $30,000 in the treasury, an amount largely in excess of the liabilities of both companies. (Witness desires to correct the answer to the last question by withdrawing his statement of the amount in the treasury, and saying there was a large sum without stating the amount.) The debts were all paid as fast as they matured within six months after the consolidation.

Cross-examination:

Q. 85. What provision was made, if any, at the time when the consolidation was effected for securing the creditors of the West Fairmont Gas Coal Company other than having money in the treasury of the consolidated company?

A. The debts of each company were to be paid by the consolidated company, and were thus paid.

243 Q. 86. Was that provided for in the deed by which the West Fairmont conveyed its property to the consolidated company?

A. I cannot recollect whether the liabilities of the West Fairmont company were mentioned in the deed or not, but as it was an original purchase-money note for a part of the property secured by a mortgage on the property, and I suppose it was mentioned in the deed.

Q. 87. Is that the only debt that was provided for?

A. That is the only debt that we had to provide for. In other words, we had no other debts excepting current expenses, which were paid off from month to month.

Q. 89. Is that the only one that was in fact provided for?

A. So far as I know or recollect. The company was in a flourishing condition; were able to meet all liabilities at their maturity, and within a few months afterwards were entirely free from debt.

Q. 90. In estimating what would have been the clear profit to your company upon the contract with complainants, if the whole quantity of coke had been received within the time limited by the contract at between $15,000 and $20,000, did you include in that estimate the profit on the coke which was in fact delivered and received, namely, 246 car-loads?

A. I did. I said the whole contract was worth that.

Q. 91. Please give us the method by which you arrived at that estimate?

A. One of the bases of estimate was the profit which had been made on the coke manufactured between the time we commenced, in December, 1871, and the time when the contract was made. Another was the report of what the coke was costing us as we manufactured it.

Q. 92. Your estimate is between $15,000 and $20,000. Can you make a more exact estimate?

A. Well, I could by figuring over.

Q. 93. Had you figured over it before you gave it in your direct examination?

A. I figured over it before I made the contract, and I recollect the feeling that was in me and impressions on my mind at the time of making it when I left the office.

Q. 94. In figuring over it at that time did you arrive at any more exact estimate than you have now given?

A. I think I did.

Q. 95. What was that?

A. I thought and felt that the contract was worth $16,000
244 profit to us, irrespective of the lessening of the cost of the other work in consequence of this work.

Q. 96. Was that thought and feeling the result of any figuring?

A. Well, I had figured so often on coke and was so familiar with it at the time that I don't suppose that I made a figure on it.

Q. 97. Have you ever figured on it since then?

A. I presume that I have, but I don't recall any figuring, but I think I figured on it when we were making our complaints. I must have figured on it, for my conclusions were that the damages or loss to us was between $9,000 and $10,000 on the amount undelivered.

Q. 98. Was your estimate of $16,000 clear profit based on any data?

A. Yes; on the previous cost of the coke.

Q. 99. What did the coke cost you which was delivered under the contract?

A. I can't answer that exactly.

Q. 100. Can you answer it proximately?

A. Yes; Jackson, who was then superintendent, stated and thought it was costing as about 2¼ to 2½ cents per bushel. My own impression was that he was underestimating it. I thought it was costing us a quarter of a cent more than he estimated it.

Q. 101. How did you get at the estimate of the cost of coke a bushel?

A. The quantity of coal required, the value of that coal, and the labor necessary to convert it into coke.

Q. 102. Can you give the items?

A. I can't give them now, for the reason that a certain portion of the slack was valueless and an expense to get rid of, and a portion of the coal we used was merchantable coal.

Q. 103. Are the items that you have named of the quality of coal used the value of that coal and the labor necessary to convert it into coke all the elements which entered into your estimate of the cost of the coke?

A. I don't recollect any other items that appertain to the cost of the coke. I might add the item of the labor of drawing from the ovens and loading into cars, which was included. In estimating the cost we included every item of expense necessary to place it in the cars ready for transportation.

Q. 104. Did you include any other items except those which you have named?

245 A. There were items attending each operation, and those little items were all included.

Q. 105. Were the items included in your last answer small and such as you would generally include under incidental expenses?

A. Not exactly; they would be regular items in estimating or making calculations of the cost.

Q. 106. What kind of items were they?

A. Perhaps the best reply to that would be to recite the details of the manufacture from beginning to end. The first item of expense on waste slack is a laborer to place the wagon under the screen; the next is for him to take a horse and draw it on top of the ovens; next is to charge it into the ovens; next is for the man who tends to the oven to take a rake and even the surface of the coal in the oven; the same man then fills the door of the oven with bricks; after a little he besmears those with clay mortar, leaving an opening at the top of the door for a draught; as the gas and smoke pass off the draught is reduced, which he does; he continues to reduce the draught until the coke is pretty well formed, having much less draught when the coke is nearly finished from what he had when the oven was charged; when the coal seems to be thorougly caked and carbonized he pulls out the brick in the door, takes a pipe and pours in water over the surface of the coal; he then commences to draw the coke; when it is out he takes a fork, pitches it over to the front edge of the platform, where it lays until it's taken by the loaders by hand barrow or forks and put into the cars. When we take coal that is merchantable we have to add to all this expense a valuation for the merchantable coal; that embraces, I believe, with the expense of an overseer, the items of computing the cost of coke.

Q. 107. Did you use merchantable coal in making the 246 car-loads of coke that was actually delivered under the contract?

A. No doubt but what there was some, but I don't think to any great extent.

Q. 108. Did that item of additional cost for merchantable coal enter into your estimate of 2¾ cents per bushel for the 246 car-loads last named?

A. On the estimate of cost of 2½ or 2¾ we embraced everything that we considered whereby there was a chance for us to incur expense, intending to make our estimate full—that is, over instead of under.

246 Q. 109. Did you, in fact, include in that estimate the additional cost for merchantable coal?

A. I can't tell any nearer than I have already told you; I don't remember the items which entered into an estimate which was made

so long ago, but I gave a statement of the items that should enter in, and I presume they did.

Q. 110. Are you, then, speaking not from your recollection of the items that actually did enter into your estimate of the cost of this coke, but merely from your knowledge of what should have entered into it?

A. I speak from what has always been my invariable custom, not from any memory of the details of the calculation.

Q. 111. Do you mean your invariable custom at that time of calculating the cost of coke?

A. Yes; both before and after.

Q. Did you include, in your estimate of $2\frac{1}{2}$ to $2\frac{3}{4}$ cents per bushel, any expense for mining the coal?

A. In estimating the value of merchantable coal that would be covered; the coal that we would throw away there was no miners' expense attached to.

Q. 112. Then did you value anything else but the merchantable coal in making your estimate?

A. As the slack was valueless I don't know why we should count it as if we did not use it in the ovens; it cost us something to cart it away.

Answer objected to as not responsive to the question.

Question repeated.

Objected to for vagueness.

A. No other coal.

Q. 114. Had you been in the habit before you began to manufacture coke of selling no screenings whatever?

A. Within eight or ten years we had sold about half a dozen car-loads at a very small price per ton.

Adjourned until May 4, 1880.

Q. 115. After you began the manufacture of coke did you use in its production every class of coal that would fall through your screens?

A. Yes; we used two or three sizes of screens and used the coal that went through those screens, as we had the screens in; sometimes we did not use the coarser screens.

Q. 116. Before you began to manufacture coke had you been in the habit of throwing away all the coal which fell through
247 your screens, with the exception of the car-loads mentioned above as having been sold?

A. The number of car-loads that I mentioned is as near as I can recollect. I don't think that it exceeded a half dozen. With that exception, all our screenings were thrown away. Everything which goes through the screens are called slack.

Q. 117. After you began the manufacture of coke did you not use screens which would allow larger pieces to fall through than the screens which you had previously used?

A. All the coal that we shipped prior to making coke was not screened, but a portion was, and sometimes we used a two-and-a-half or two-and-three-quarter inch screen, and I think we never have used a coarser screen than that, although it is possible that we may at some time have used a three-inch screen.

Q. 118. Before you began to manufacture coke what proportion of your coal was screened?

A. Sometimes all was screened, at other times not over half.

Q. 119. What determined you in screening your coal or leaving it unscreened?

A. The coal shipped west all was screened, because it was customary and a requirement of the trade. A portion of that shipped east was screened which was by special contract, and for which we got an extra price. Some of the coal shipped east was not screened, it not being required for certain markets.

Q. 120. After you began to manufacture coke did you screen all your coal?

A. No.

Q. 121. What proportion did you screen then?

A. The majority was screened, I think.

Q. 122. What did you mean by the term "merchantable coal" used by you above?

A. The coal that would pass through the coarse screen and not through the fine screens; the object of the gas company being to have coal that was free from what we term "dead slack," which is coal running from the size of a kernel of corn down to dust. Coal that would not pass through a three-quarter inch screen was considered merchantable coal.

Q. 123. Is that what you call nut coal?

A. Yes; although we threw away thousands and thousands of tons of nut coal.

Q. 124. How much nut coal did you use in manufacturing the coke delivered under the contract?

248 A. For the purpose of increasing the reputation and value of the coal that we shipped, and having an opportunity to utilize the waste or slack (screens), we screened coarser than we would have done otherwise, which increased the yield of slack perhaps ten to twenty per cent. I can give no positive answer to the question.

Q. 125. You then used, did you not, in making coke that amount of coal which you had previously sold as coal?

A. In some cases, but not all.

Q. 126. Did not that increase the cost of coke?

A. Slightly, perhaps.

Q. 127. How much per bushel?

A. As the quantity was indefinite, sometimes used and sometimes not, it is impossible for me to tell. I don't know that I ever made an estimate where there was a positive basis to work on.

Q. 128. What would be the increase from that cause in the cost of the coke at such times as you used this nut coal, supposing it to increase the amount of slack 20 per cent.?

A. As we shipped so much of our coal that went over a two-and-one-half or two-and-three-quarter inch screen prior to commencing to make coke, it would be very difficult to tell what increase of cost there might be; but supposing that we screened that nut coal expressly for that purpose and had a full market for it for other purposes, it would be so small on a bushel that I could not arrive at it without an actual test.

Q. 129. Was this nut coal the only merchantable coal you used in the manufacture of coke?

A. Nut coal was not at all times merchantable, but we did use some run-of-the-mine coal, which is coal just as it is brought out of the mine in the mine wagon, just as it was shoveled up into the wagon in the mine.

Q. 130. In making your estimate of two and one-half to two and three-quarter cents per bushel as the cost of coke, did you include in that anything at all for the coal used?

A. Yes.

Q. 131. Did you for the slack?

A. In estimating on profits I would not estimate on slack of any value. I have, however, sometimes assumed a value for the coal to be put into coke. I don't think that I estimated the slack as of any value, and yet to cover contingencies that might arise from the use of merchantable coal I generally assumed a value to the coal used for coke.

249 Q. 132. In making that estimate did you include in it anything for the value of the nut coal you used in making coke?

A. Not specifically of itself.

Q. 133. Was your figure for the cost of the coal in your estimate of the cost of the coke anything more than a guess?

A. No; it was an assumption—the nominal sum.

Q. 134. Did not that make the whole estimate uncertain?

A. No.

Q. 135. Why not?

A. The proofs of it were the results from coke previously manufactured, and likewise the very small percentage of coal that was used that could have been sold.

Q. 136. Did not your estimate of the cost of coke contain one element which was altogether uncertain?

A. It might. In assuming a thing as not positive it is, to the best of my knowledge, derived from observation and experience.

Q. 137. During the time when you were delivering coke under the contract what was the actual cost of the coke delivered?

A. I estimate it from two and one-half to two and three-quarter cents per bushel.

Q. 138. How was that estimate made?

A. Mainly from facts.

Q. 139. Can you give the data?

A. No; I cannot.

Q. 140. Why not?

A. Because the accounts which I received from the mines at the time were elements or a part of the calculation. I cannot give the

details of the calculation. I thought it over fully last night to see if I could make that very calculation, and the want of knowledge of pay, wages, piece-work, and results made it impossible for me to do so.

Q. 141. Did you make any such calculation of the cost of the coke after you had delivered the two hundred and forty-six car-loads?

A. I made a great many calculations of cost, and think that I made a calculation including that two hundred and forty-six car-loads to know how much the company were out on their investment of over $20,000 in those ovens.

Q. 142. Have you any definite recollection of that particular calculation?

A. Yes. Our coke operations had resulted in reimbursing us by over $13,000 out of the $20,000.

250 Q. 143. Where is that calculation?

A. It was made in New York, and I don't know that there is or was a record of it.

Q. 144. Where are the data you mentioned above?

A. In the New York office. Our accounts are all kept there. That is the head office.

Q. 145. Can you produce those data?

A. I don't think I could.

Q. 146. Why not?

A. Because the accounts were not kept in accordance with my estimate. My estimate originated from curiosity or a desire to know what were the results.

Q. 147. Are there anywhere in existence any of the data from which you made your estimate of the cost of the two hundred and forty-six car-loads of coke?

A. Portions are.

Q. 148. What portions, and where?

A. Pay-rolls; copies of which are at Fairmont and in New York. These are the only ones in existence that I know of.

Q. 149. Do those pay-rolls furnish data for the quantity or value of the coal used, or only for the single element of labor?

A. The pay-roll is the wages paid for labor; likewise the pay-roll embraces the cash payments for the month.

Q. 150. Did you have, when you made your estimate last above mentioned, any other data before you than the pay-rolls?

A. Yes; I had.

Q. 151. What were they?

A. I had a general account of the month's work.

Q. 152. Was that all?

A. I had other papers. There was a statement of cash, and I have a daily record of shipments, which are copied into a book devoted exclusively to that purpose.

Q. 153. Was that all?

A. That is all that I think of.

Q. 154. How did the record of shipments of coal have anything to do with your estimate of the cost of coke?

A. The shipments of coke were kept on the same book and were entered at the same time.

Q. 155. Then were the data used by you in making your estimate of the cost of the two hundred and forty-six car-loads of coke only the pay-rolls, the statement of cash, the general account of the month's work, and the account of the shipments of coke?

251 A. No; I had Dewey, Vance & Co.'s account besides; sometimes their account overrun and sometimes fell short.

Q. 156. Do you mean the account on your books of what was charged against and paid by Dewey, Vance & Co.?

A. Account rendered by Dewey, Vance & Co. to us of the coke received by and paid for by them.

Q. 157. What was contained in the general account of the month's work spoken of by you?

A. Shipments.

Q. 158. Could you, from the data you have now named, make up at the present time an estimate of — the two hundred and forty-six car-loads actually cost you?

A. I don't think I could; I don't think it is possible.

Q. 159. If those were all the data which you had before you when you made the estimate last above mentioned, how were you able to make that estimate then any better than now?

A. Because eight years ago I had personal knowledge which I have not now.

Q. 160. Personal knowledge of what?

A. Of the business transacted and then being done.

Q. 161. Did you make the estimate last above named eight years ago?

A. No.

Q. 162. When did you make it?

A. After the ovens were closed and stopped working; it may have been six years ago.

Q. 163. Did you then have the personal knowledge you spoke of a moment ago?

A. It was then all fresh in my memory; the knowledge was almost perfect.

Q. 164. Of what things did you then have knowledge, since lost, which entered into your estimate of the cost of that coke?

A. The details of business, many of which are not matters of record.

Q. 165. What was the character of those details which affected the cost of coke?

A. Every transaction has separate details, and I cannot recollect the details to any extent.

Q. 166. Have you not said, in speaking of your first estimate of the cost of coke, that it was made according to a custom invariably followed by you in estimating the cost of coke?

A. Yes.

252 Q. 167. Was that custom departed from in making the estimate which you made about six years ago?

A. I believe not.

Q. 168. If that was a method invariably pursued by you, please give the elements of the calculation.

A. I can only give them as they have been given in a previous statement, made in answer to the question last night, and that statement is a better one than I can give at this time.

Q. 169. Did that statement comprehend any data, a knowledge of which you had at the time of making the estimate and which you have since lost?

A. It did.

Q. 170. When you testify that the cost of coke was two and one-half to two and three-quarter cents per bushel are you not testifying simply from your recollection of an estimate made six years ago, the accuracy of which you have no present means of verifying?

A. Very much that way.

Q. 171. In making your first estimate of the cost of coke did you include anything for the cost of mining the coal?

A. The estimate of the value of the coal covered that.

Q. 172. How much did you allow per bushel for mining the coal in making that estimate?

A. I cannot tell.

Q. 173. How much coal was consumed in making a bushel of coke?

A. The estimate was 50 per cent. more coal than there would be coke, or 1,600 lbs. of coke from a wagon-load of coal which held over a gross ton, say 2,400 lbs.

Q. 174. What did you pay in 1872 for mining coal?

A. I have forgotten.

Q. 175. Can you approximate?

A. My impression is 40 to 50 cents per wagon.

Q. 176. Did you pay for the wagon-load as it came out of the mine, including the coarse coal as well as the slack?

A. I did.

Q. 177. Was there not a considerable period during the time when you were delivering the 246 car-loads during which you constantly had to use what you have called "merchantable and run-of-mine" coal in making that coke?

A. Only a short period, and in very small quantities at that.

Q. 178. When was that period?

253 A. When we were making the heaviest shipments of coke daily.

Q. 179. How long a period was it?

A. From one to three weeks, and I have put that extreme on the length of time. It was during the month of October, 1872.

Q. 180. What memoranda, if any, do you use in answering the last question as you have done?

A. Reference to the statement rendered by Dewey, Vance & Co. (Exhibit "M" of complainant's depositions).

Q. 181. How did that statement enable you to answer the question as you have done?

A. Because we were more pushed for coal to supply the ovens at that time than at any other time.

Q. 182. Have you any other recollection, apart from the inference

you draw from the fact just mentioned, with reference to the use of the "run-of-the-mine" coal in making the 246 car-loads of coke?

A. Yes. They had to use at that time some run-of-the-mine coal and that drove them to that old slack pile. This is from recollection, and it was to avoid the use of large lumps in the run-of-the-mine coal which were unhandy to get into the ovens and which, when in, did not carbonize as easily and as freely as coal that was fine. I use the word "old" above, which is not literally correct.

Q. 183. At what time did you begin to use the slack pile?

A. In the latter part of October, I believe.

Q. 184. Were you there during the one to three weeks when the run-of-the-bank coal was used?

A. Well, I believe I saw a load or two of the bank coal used before I left there in the latter part of September; and then there was some in the latter part of September and the first part of October.

Q. 185. Why were you using that coal in September?

A. It was because we were using considerable slack to fire up or heat the ovens with. We were using coal and coke both for that purpose, and I think that the supply of slack was a little short.

Q. 186. What was the entire cost to you at that time of coal per bushel, including mining and everything else?

A. I don't know that I ever estimated the cost of a bushel of coal in my life.

Q. 187. Then give the cost per wagon.

254 A. There was four cents per wagon additional to the cost of mining, which was 40 to 50 cents, as I have previously stated.

Q. 188. Do you include in that estimate of the cost anything for the royalty on the coal or for keeping up your tram ways and stock?

A. No one has ever yet found out what a ton of coal costs us, neither can they in the bank or when it is ready to come out. We have an equipment account, separate and distinct, also a machinery account, farm account, and building account.

Q. 190. Does not the expense of keeping up the tramways, stock, and equipment add something to the cost of every wagon-load of coal?

A. Those accounts when we have been making money have been balanced by charging 10 per cent. to expense account and bringing the balance down to the next year.

Q. 191. Do you, then, estimate the expense named as adding ten per cent. to the cost of the coal as you have given it above?

A. No; I think you have misunderstood the tendency of the previous reply.

Q. 192. Is not that the result which follows from making a gross charge of ten per cent. on the expense account in the manner you have described?

A. The fixed expense, such as my salary, agents' salary, rents, and travelling expenses and various other items, are all charged to expense account and are considered necessary expenses, whether we

do little or much, affecting the general result at the end of the year, but are not a basis of calculation on contracts at the time being made.

Q. 193. Speaking without any reference to contracts, do not these things which you have named add, in fact, to the actual cost of the coal?

A. They add to the expense of conducting the business, and at the end of the year, by taking them and averaging them, we find how much per ton it has cost during the year to do business; the greater number of tons that we have gotten out, the less loss per ton; hence in the loss in getting out the coal for this contract we lose the benefit of the tonnage for the average at the end of the year.

Q. 194. In making your estimate in 1872 that the coke to be furnished would cost $2\frac{1}{2}$ to $2\frac{3}{4}$ cents per bushel did you include anything for which you have called fixed expenses, such as salaries, keeping equipment, &c.?

A. Those items were not included.

255 Q. 195. How much would the expenses named in the last question have added to the cost of the coke if you had included them in your estimate?

A. They would not add anything to the cost of the coke, but if the contract had been carried out it would have added to our profits.

Q. 196. Could you have made the coke without incurring those expenses?

A. They were fixed expenses, coke or no coke, most of them.

Q. 197. Question repeated.

A. We could neither have mined coal nor made coke without.

Q. 198. Why, then, do you say that they would not add anything to the cost of the coke?

A. Because coke was the minor issue of the business; coal was the leading issue, and the expenses were necessary for the leading interest.

Q. 199. In 1872 and 1873 how much did these fixed expenses add to the cost of coal as you have given that cost per wagon?

A. They did not add to the cost, the average cost depending upon the extent of our business, and what that average cost was I have not the remotest idea, or how much it cost us per ton to do business per year. The coke business was started for the purpose of utilizing our slack or waste.

Q. 200. What is usually the average cost of doing your business for the ton of coal?

A. I can only answer as to one year, and that not positively. I think last year it cost us a little less than fifteen cents per ton. The other years I don't recollect.

Q. 201. Can you approximate by comparison with last year what was the cost per ton in 1872–'3?

A. I don't know the extent of our business in 1872–'3. Furthermore, no statement was made of that kind for those years, the statement of the kind I have alluded to above having been made

only the last two or three years; as business grew closer and profits less we criticized our business more closely.

Q. 202. Was the volume of your business greater or less in 1872 and in 1873 than it was last year?

A. Well, I think it was very similar.

Q. 203. Were your salaries and other fixed expenses greater or less in 1872 and in 1873 than they were last year?

A. I thind they were very similar.

256 Q. 204. Can you now proximate the average per ton of coal which your salaries and other fixed expenses cost in the years 1872–'3?

A. I think I have answered it in a previous question in comparing with last year, when I stated that it was less than fifteen cents per ton.

Q. 205. If you had distributed the cost of these fixed expenses over the coke which you manufactured as well as over the coal which you mined, what would have been their average cost per ton of coal or per bushel of coke?

A. Inasmuch as there was but very little merchantable coal used in the coke (and I don't know how much that was), it would have been a very small item, and I can't tell what it would be.

Q. 206. About how many tons of coal did you mine in the last four months in 1872?

A. I really don't know; I have no idea.

Q. 207. How did the quantity named in the last question compare with the quantity of coke manufactured during the same period?

A. The quantity of coal necessary for coke in proportion to what we mined is very slight, as I don't think the ovens ever required more than 35 or 40 tons of coal per day; possibly some days it may have exceed 50 tons, but 30 to 40 tons was the general amount required, and the coal that we were shipping would run from 150 to 200 or 250 tons per day.

Q. 208. If you had distributed the fixed expenses over the coke and coal in the proportions of 30 for the coke and 150 for the coal what would have been the cost of these fixed expenses on the average for the ton of coke?

A. The coke was all covered by the mining expenses of the coal.

Q. 209. In estimating the cost of these fixed expenses at about 15 cents per ton of the coal did you include the coal which went into the manufacture of coke?

A. It was on all the coal which came out of the mine whether we threw it away or shipped it or used it for coke.

Q. 210. In estimating the cost of coke in 1872 at $2\frac{1}{2}$ to $2\frac{3}{4}$ cents per bushel, did you include in that estimate anything for the fixed expenses?

A. As coke was a side issue, I did not.

Q. 211. Why, then, did you say, in answer to question 208, that the coke was all covered by the mining expenses of the coal?

257 A. Because the 15 cents has reference to the result at the end of the year, and merchantable coal used in coke was so

small a percentage that it would not enter ordinarily in a calculation on coal for coke.

Q. 212. Would there be any trouble in making a calculation so as to distribute the fixed expenses proportionately over both the coke and coal manufactured and mined in the years 1872 and 1873, if you desired to make such a calculation?

A. I don't think it is possible to be done.

Q. 213. Why not?

A. Coke is no part of the work of our fixed expenses apart from the coal. The fixed expenses depend on the output, and I don't know any method by which it could be arrived at. It has been output before it is made into coke. The charges would be the same as I reported in detail yesterday. It would be right to charge coke with the good, merchantable coal that went in, but it would not be right to charge it for the waste or slack, because in putting that waste or slack on the ovens for coke it cost us less than to cast away and dump it.

Q. 214. If in 1872 you had mined no coal for shipping, but had made the quantity of coke which you actually did make and had kept your salaries and other fixed expenses at the same figure at which they actually then were, would there have been any difficulty in computing what those fixed expenses would have been on the average for the ton of coke?

A. In the first place, the supposition is a matter that the company would not have submitted to. In the second place, had they conducted a business they would have required very much less officers or superintendents, and their compensation would have been reduced to accord with the profits of the business; but, of course, if an expense account is kept and there is only one item upon which that expense account is to go it would be very easy to average it upon the tonnage.

Q. 215. Why, then, can you not make a similar calculation when there are two items upon which the expense account is to go?

A. Because one item is kept in proper shape for that purpose. The other is not.

Q. 216. If you know the proportions between the two items to be as 30 to 150 can you not make the calculation?

A. No; because the 30 is mainly waste and the 150 is good material, and the relative proportions vary every day and month.

258 Q. 217. Did you include the salary of your coke boss among your fixed expenses?

A. No; that is charged directly to the coke.

Q. 218. Was his salary included in your estimate of the cost of coke made in 1872?

A. Certainly.

Q. 219. Was that of your Connellsville coke boss included?

A. Yes; it was charged directly to the coke. The previous coke boss, who, I suppose, was alluded to in the previous question, was at the same time pit boss. Therefore I will amend that answer by saying that I don't know that he received any extra compensation for attending to the coke; yet he might. He was Jackson's em-

ployee and was completely under Jackson's thumb, and would do anything that Jackson wanted him to. That was while Jackson was there.

Q. 220. Had you in October, 1872, employed or made arrangements to employ your Connellsville coke boss?

A. No, sir; he was not employed for over two months after that.

Q. 22. How, then, could you in October, 1872, have included his salary in your estimate of the cost of the coke?

A. Of course, I did not include the salary of a man who was not there. My attention having been called to answer to question 219, I would say that it was made under a misapprehension in referring to the time when Gaskell, our pit boss, was acting as coke boss, I supposing that it referred to the coke boss from Connellsville, whose salary was added to the cost of the coke only from the time he was employed by us.

Q. 222. What salary did you pay the Connellsville coke boss?

A. I have forgotten. It might have been $35.00 per month or it may have been more. I think it was about $35.00 per month.

Q. 223. What was in 1872 and 1873 the cost of manufacturing coke, exclusive of the value and cost of mining of the coal which was used in making it?

A. Probably within a quarter to one-half cent a bushel of what I have stated as my estimate of cost. It is so long since that estimate was made that I have no recollection of its details.

Q. 224. Did you include in the estimate made in October, 1872, anything for the cost of keeping up your pumping and
259 other machinery used in connection with your coke manufactory?

A. The labor of all the men employed in the manufacture of coke or appertaining to its manufacture was charged to the coke, and I suppose were included in estimating the cost of its manufacture. The water was derived mainly from a small brook; we pumped some. There were no repairs to be made, as the ovens were new, and therefore we did not include it in the estimate. Some of the ovens were not finished for months after we commenced delivering the coke.

Q. 225. Did you include in that estimate anything for interest on the money invested in ovens and machinery connected with the manufacture of coke?

A. There was little or no machinery to include in the estimate. I don't know and don't recollect as we had any machinery except a little upright boiler, to which was attached a pump. We did not make any charge for interest, as that interest we had to lose, whether we had the ovens or not.

Q. 226. Is not interest on the money invested a proper element in a calculation of the cost of coke?

A. Our company is a stock company; we never charge interest against any of our property. We only try to make contracts that will pay a profit over the money expended in fulfilling those contracts. I can say that I have sold coal at cost, calculating by the

operation to make money by the increased daily output in consequence.

Q. 227. Speaking without reference to the methods of your company, would you not consider that it would make a difference in the cost of coke whether you had $20,000 or $200,000 invested in the apparatus for making it?

A. No; if I had a business commensurate with the larger capital; only, I would say, that the more money I had in it the more would I make and the cheaper could I sell it.

Q. 228. Would it make a difference if your business with $200,000 invested was no greater than your business with $20,000?

A. Yes; if the company was in debt it of course would; otherwise, not; but assuming that a thing was worth what it would fetch as its market value, I should say not.

Q. 229. Do you think that the cost of production is not affected at all by the question of the amount of capital invested?

A. If the business is in proportion to the investment the
260 cheaper you can afford to manufacture, if the business is conducted economically.

Q. 230. Supposing the volume of business to remain stationary, do you think that the cost of production is not affected at all by the question of the amount of capital invested?

A. Well, the larger the capital the smaller the dividends on a stationary business.

Q. 231. Question repeated.

A. I don't think the cost has anything to do with the capital, provided they are out of debt.

Q. 232. Why do you make a difference in the matter of cost between being in debt and out of debt?

A. Because, if in debt, you have got to pay your earnings to the extent of interest to your creditor, and if out of debt they can be paid to the stockholders, who should receive them.

Q. 233. How does that affect the cost of production?

A. I think that it has nothing to do with the cost of production.

Q. 234. If in making your estimate in October, 1872, of the cost of coke and placing it at $2\frac{1}{2}$ to $2\frac{3}{4}$ cents per bushel you did not include the value of the slack to be used, nor the salary of your new coke boss, nor interest on the money invested in the manufacture, nor wear and tear, nor the fixed expenses of running your company, don't you think that that estimate may have been a little too low?

A. No; I do not, because the new coke boss was not there until two months after; the ovens were entirely new and needed no repairs; the slack was waste; the salaries were fixed, coke or no coke, and the coke had nothing to do with those salaries to make them more or less; the interest on investment is never an item of cost, either on coal or coke, as that interest accrues whether you are doing animmense business or none at all.

Adjourned until May 5, 1880.

Witness desires to add to what he said yesterday about merchantable coal as follows: Relative to the run of mine or merchantable

coal I desire to state that during the month of September, 1872, in the pressure for coal to supply the ovens, some merchantable coal, I have no doubt, was taken to supply contingencies, probably to the extent of 25 or 50 wagons; also for October of the same year, and for the same reasons perhaps, 75 to 100 wagon loads, which perhaps was not included in estimating costs or profits, and, if not,
261 would be a proper charge as against the coke; but, at the same time, as the acting coke boss had commenced taking slack from the slack pile I have some doubts as to my admission. The merchantable coal was not used after October, as the quantity of coke that we made was so small that there was no necessity for it. The Connellsville coke boss was an extra, but our pit boss was not an extra. We only had the Connellsville coke boss as will apply to this for about two months—the months of February and March, 1873, during which months only 45 cars were delivered. As an estimate of value for that coal I would say 50 cents per wagon would be a fair valuation. I think we paid the coke boss about $35 per month. Those estimates might vary the estimate for the cost of coke and the claim for damages for the time expressed to the extent to which these items would amount. The salaries of the officers or staff are fixed in January for the year and remain in force for that length of time whether little or much is to be done, the company claiming the best services for its interests of those individuals; and, furthermore, I would add that the president and agent were at all times willing and anxious to do all that they could for the best interest of the company.

Q. 235. Could your company have continued to supply coke at an average of 3 cars per day from November 1st, 1872, until July 1st, 1873, without constantly using merchantable coal to some extent in its manufacture.

A. That would have depended upon the amount and kind of business that we had to do. With a knowledge that a certain quantity of slack was required daily for the ovens we should have made greater efforts to make contracts requiring screened coal than we did or would otherwise. Our preference was to sell run of mine coal, as it avoided waste and the trouble and expense of getting rid of that waste. With the experience we had relative to the deliveries of coke we knew that a demand for an extra quantity of slack would not be required; therefore the extra effort for selling screened coal was not made, and had Dewey, Vance & Co. required the delivery of 3 cars of coke per day it would have been necessary, as our contracts were, to have used probably some merchantable coal.

Q. 236. Supposing your company to have done the business in coal which it actually did during the time named, could it have supplied an average of 3 car-loads of coke per day without constantly using merchantable coal to some extent?

A. I think not. We might have required 5 or 10 wagon-
262 loads a day; I don't know; some days more, some days less. Some days we might have required 1 wagon-load, some days none, and some days perhaps 10 or 15. I have so little recollection

of what was doing at that time that it is more supposition than anything else.

Q. 237. If, then, you had gone on to furnish an average of 3 cars per day, your coal business remaining the same, would not the use of this merchantable coal have increased the cost of the coke between November 1st, 1872, and July 1st, 1873, just as it did in September and October, 1872?

A. If we had continued to deliver 3 car-loads per day I should have endeavored to make contracts to provide the coal required; in other words, sold screened coal, and in anticipation of a necessity for screenings or slack did sell some that I would not have done otherwise; but we would, without changing the contracts or making any efforts, *we would* probably have had to use some merchantable coal, but to a less extent than we did when the business was in the crude state that it was when we made our first deliveries, in October, 1872; if the case were as Mr. Russell supposes in his question a smaller result would follow.

Q. 238. How many bushels of coke would you have delivered by July 1st, 1873, if the terms of the contract had been strictly pursued?

A. The figures, according to the average of what we actually did deliver, would be 423,150 bushels, and we should probably have exceeded that slightly.

Q. 239. How were you to be paid for that?

A. Six cents per bushel of forty-one pounds, for which we were to take the note of Dewey, Vance & Co. at ninety days from the first of the month for the deliveries of the preceding month, as shown by Exhibits "D" and "C," filed with complainant's depositions in this cause.

Q. 240. How much money would you have received on the 423,150 bushels?

A. $25,389.

Q. 241. What would have been the equivalent in cash of $25,389 at three months?

A. If discounted at nine per cent. per annum it would be $24,817.75, but in mercantile transactions if a man pays within thirty days he complies with the terms of a sale called for cash; again, those notes that we did receive were not all discounted; therefore we saved the interest or discount.

263 Q. 242. How much would the 423,150 bushels have cost you at 2¾ cents per bushel?

A. $11,636.61.

Q. 243. What, then, would have been the difference between the $24,817.75 net cash which you would have received for the whole quantity and the $11,636.61 which it would have cost you at 2¾ cents per bushel?

A. $13,181.14.

Q. 244. How, then, can you say that your net profit on the coke which you would have delivered if the contract had been completed would have been between $15,000 and $20,000, as you have said in

one place, or would have been $16,000, irrespectiveof the lessenings of the cost of other work, as you have said in another place?

A. As Dewey, Vance & Co. were anxious for the delivery of a greater quantity of coke per day than the contract called for I anticipated that the deliveries under the contract would be greater than the deliveries the contract called for. Again, the longer we worked at the making of coke and the greater amount that we had to make within our capacity the more profitable it would be to us. I may have taken the figures 2½ cents per bushel as a basis instead of the figures 2¾, which I used in the preceding calculation. I likewise stated in another part of my evidence that the loss was between $9,000 and $10,000 on the coke not delivered, which was a statement of the amount which I had made in previous calculations.

Q. 245. Please figure out that $9,000 to $10,000 in the same way in which you figured the $13,181.14.

A. When I figured out the original $9,000 or $10,000 I figured the amount received from Dewey, Vance & Co. as net cash without any allowance for discount or interest, but figured on the above basis of $13,181.14; it is $8,426.98.

Q. 246. What difference in that calculation will it make to leave out of consideration the discount on Dewey, Vance & Co.'s paper?

A. $365.22, making the result $8,792.20. My calculations on the whole matter was made without allowing the 2¼ per cent. discount on the whole amount of $25,389.

Q. 247. What difference would it make on the $13,181.14 to leave out of consideration the discount and to calculate it as you have calculated it?

A. It would make a difference of $571.25, which would be added to the $13,181.14, making $13,752.39.

264 Q. 248. Then, when you said that your net profits on the amount not delivered would have been between $9,000 and $10,000, did you mean that they would have been $8,792.20?

A. No; I did not mean what I said, but the figuring and calculations that we have gone into establish a different basis for calculating, and my calculation then might have been on 2½ instead of 2¾ as cost.

Q. 249. Please state what your calculation, then, was without regard to what it might have been.

A. That calculation was made three years ago, and only the gross amount is retained in my memory; the details I have forgotten.

Q. 250. Do you know of any proper basis of calculation which will bring your net profits over $9,000?

A. As a basis has been established and that is accepted as correct I cannot say that I do.

Q. 251. Do you know of any correct basis of calculation which would bring your net profits on the whole 682 car-loads up to $16,000 or over $15,000?

A. In estimating the profits at $15,000 or $16,000 we assumed advantages which we expected to derive from continuous and large

manufacture; that not having been done and another method adopted, I don't.

Q. 252. Do you mean by "advantages which we expected to derive from continuous and large manufacture" to indicate the advantages you would have derived from lessening the expense of your other business?

A. To a certain extent. We always, when we have full work, get more work done for the same money than we can when it is not full or the work is slack.

Q. 253. If in estimating the profits at $15,000 to $16,000 on the whole 682 car-loads you took into consideration the advantages mentioned in your last answer, why did you say, in answer to the ninety-fifth question, "I thought and felt that the contract was worth $16,000 profit to us, irrespective of the lessening of the cost of the other work in consequence of this work?"

A. I then felt as if we could make that money out of it and were sure to do it.

Q. 254. When you thought that did you then take into consideration the lessening of the cost of the other work in consequence of this work?

265 A. No; it was of mental calculation. There was no figure made on it.

Q. 255. Whether it was a mental calculation or not, did you, in making it, take into consideration the lessening of the cost of the other work in consequence of this work?

A. I don't think I did; I am quite certain I did not.

Q. 256. Why did you say that you did in answering question ninety-five?

A. I don't. It was left on my mind as the value of that contract.

Q. 257. Why did you say that you did to a certain extent in answer to question 252?

A. That reply does not apply to the other work; that had reference simply to the coke. I did not notice in making the reply the reference to the other work.

Q. 258. On what basis did you get $16,000?

A. On what we had done before and what we could on this.

Q. 259. Please give the figures.

A. I cannot give figures, as I have no recollection of the figures which were in my mind six or eight years ago as a basis of calculation.

Q. 260. Can you give the method without the figures?

Objected to because the whole subject has been gone over in cross-examination more than once.

A. I cannot give a method of a mental calculation made perhaps six or eight years ago and perhaps made in the space of ten or fifteen minutes or less.

Q. 261. Was that calculation anything more than a mere guess?

A. Yes; because there was a basis for it—our previous operations and a knowledge of those operations.

Q. 262. Are there any means in existence of verifying the accuracy of that calculation?

A. There may be, but none that I can call to mind. I was thoroughly familiar at that time with the whole business and everything appertaining to it.

Q. 263. What was the reason why your market for coke became less after October, 1872, than it had been before?

A. Mainly the increase of new ovens and of coke manufacture; also the less demand from iron manufacturers.

Q. 264. Did you make the 436 car-loads of coke not delivered Dewey, Vance & Co.?

A. No. When we had no orders for coke we stopped work
266 after accumulating some coke on the yard. In anticipation of a demand from them we made more coke, which was left on the yard, than we otherwise should have done. Furthermore, a good deal of that coke thus manufactured and put on the yard was lost by being exposed to the weather and not being merchantable after exposure.

Q. 265. How much was thus manufactured, more than you would have manufactured but for this contract?

A. Quite a large quantity; I can't say how much.

Q. 266. Can you approximate?

A. Not with any degree of accuracy.

Q. 267. Can you ascertain from your books and tell us?

A. I don't think I could.

Q. 268. Why not?

A. Because there was no account kept of it.

Recess until 1.30 p. m.

Q. 269. How much coke, in the aggregate, did you sell prior to October 4, 1872, to persons other than Dewey, Vance & Co.?

A. I don't know; of course, I can't tell.

Q. 270. Could you tell exactly by examining your books?

A. Certainly; all the sales are recorded and entered.

Q. 271. Will you examine your books and answer exactly?

A. In order to do that I should have to go to New York and refer to the books. I will give such information as I can get from the books at Fairmont, but I think that is already contained in the depositions made by Mr. Davidson in this cause.

Q. 272. Have you examined that deposition with regard to that matter and do you consider it correct?

A. I have examined Mr. Davidson's statement, which states fifty-seven cars to Hardman, seventy cars to Fitch & Co., thirty-two or thirty-three to Dewey, Vance & Co., and two to Marion Machine Company, and I suppose that statement to be correct.

Q. 273. Can you state with exactness, from your books or otherwise, how much coke was manufactured by you and sold to persons other than Dewey, Vance & Co. between October 4, 1872, and December 1, 1873?

A. Our books will tell how much was shipped and sold, but not how much was manufactured.

Q. 274. Will you examine your books and give the information asked for by the last question?

A. Yes.

Q. 275. Did you say that you had got back from your
267 profits on coke operations $13,000 of the $20,000 which you had invested in your coke apparatus?

A. In profits and benefits, I think, was the expression used, I think. No; I did not say that our coke operations had resulted in reimbursing us $13,000.00. That calculation embraced incidental as well as direct benefits; for instance, the saving of expense in getting rid of slack, the reduction of the cost of the other work done, and matters of that kind.

Q. 276. How was the cost of the other work done reduced apart from the saving of expense of getting rid of slack?

A. I have explained that matter once before, but will do it again. The more coal we get out the less it costs per ton, and the less we get the more it costs per ton, and, as before referred to, the certain salaries and monthly expenses are fixed without reference to the amount of work done.

Q. 277. How did your coke operations affect the amount of coal which you would get out apart from the question of utilizing the slack?

A. It would enable us to sell screened coal as when we could not do it otherwise, the price being so small to pay for the loss of slack and pay a fair profit.

Q. 278. Do you mean that it would enable you to utilize your slack?

A. Yes.

Q. 279. Did your coke operations affect the quantity of coal produced in any other way than by enabling you to utilize your slack?

A. It might, but I don't know that it did.

Q. 280. Then what incidental matters apart from the saving by utilizing the slack were embraced in the $13,000 estimate?

A. There were many things that I could think of then that I cannot think of now. The statement of the estimate relative to the $13,000.00 was made five or six years ago, and made only as an object of curiosity, not as a matter of record.

Q. 281. How much of the $13,000 was direct profits on coke?

A. I don't know.

Q. 282. Was not nearly all of that $13,000 made from Dewey, Vance & Co.?

A. No.

Q. 283. How much of it was?

A. I don't know.

Q. 284. Did not the coke delivered to Dewey, Vance & Co. before and after October 4, 1872, constitute over two-thirds of
268 your whole coke operations up to the time, five or six years ago, when you made the last-named calculation?

A. I don't think it did.

Q. 285. Did it constitute more than one-half?

A. I don't know.

Q. 286. You say in your examination-in-chief that prior to October 4, 1872, your coke had never been analyzed; was that true of your coal as well?

A. It was true of the coke, and the coal had been analyzed previous to the purchase of the mine by us, so I have heard, and I have seen statements of it, but I know nothing personally. We have never had it analyzed.

Q. 287. For what purpose had your coal been principally used prior to October 4, 1872?

A. For manufacturing gas, and some had been used for steam purposes.

Q. 288. Had it been tested and compared by experts in the manufacture of gas with other gas coals?

A. In its use for gas purposes comparisons were always made with other gas coals.

Q. 289. Do you recollect comparing it with other gas coals in your conversation with Mr. Wm. L. Hearne prior to October 7, 1872?

A. I do not specifically, but I have no doubt and believe that I did.

Q. 290. Do you recollect telling him that your coal compared favorably with other gas coals?

A. I have no recollection of it, but I will admit that it did, and I think that I did.

Q. 291. What are the peculiarities of a good gas coal?

A. 1st, large yield of gas; 2d, high illuminating power; 3d, low percentage of sulphur; 4th, easily carbonized; 5th, good yield of good coke.

Q. 292. You say in your examination-in-chief that there was no difference either in the material used or in the method of manufacture between the coke delivered to Dewey, Vance & Co. prior to October 4, 1872, and that delivered to them after December 13, 1872; was there not, in fact, a difference in the material used in that you had used merchantable coal in September, 1872, and did not use it after December 13, 1872?

A. The small amount of merchantable coal used in September would have very little effect upon the aggregate amount man-
269 ufactured, and the slack used after December 13th was as good as we could make. We commenced leaving a floor in the mine some time during our coke manufacture, at what time I cannot say, but I think that it was previous to Mr. Jackson's leaving our employ, and, as the main impurities of the coal vein lay at the extreme bottom of the vein, the impurities would not be taken up or included in the coal brought out of the mine; hence the screenings would be the same quality as the coal shipped. The omission of the merchantable coal would make no difference in the quality of the material used.

Q. 293. Was there any other difference or any change made, either in the material used or the method of burning or manufacture, between the coke delivered prior to October 4, 1872, and that delivered after December 13, 1872?

A. Not that I can remember.

Q. 294. Did your Connellsville coke boss make any change in the material or use any different method in burning or manufacturing after he assumed control?

A. There was no difference in the material, but he regulated the draught a little different than we had been doing before; that seemed to be his main difference in the manufacture.

Q. 295. Did that constitute a substantial or material difference in the method of burning or manufacturing the coke?

A. It seemed to make quite a difference in it, particularly in its appearance as it came out of the oven, and his knowledge and experience and confidence in his product impressed us strongly in its favor.

Q. 296. Did it make any difference in the appearance which the coke presented on exposure to the weather?

A. Not that I am aware of; any piece of coke immersed in a pail of water will turn black if afterwards exposed to the atmosphere. That word "any" is used from hearsay partially.

Q. 297. When did your Connellsville boss assume control of your coke manufacture?

A. The best evidence of that that I can give is in a letter written by me and addressed to Dewey, Vance & Co. and filed as an exhibit. I refer to the letter of the 8th of February, 1873.

Q. 298. How long before the date of that letter had the Connellsville coke boss assumed the control?

A. Only a few days.

Q. 299. If your Connellsville coke boss did make a substantial and material change in the method of manufacturing the coke, why
270 did you say, in answer to question 50, that there was no difference, either in material or method, after December 13th, 1872, from the material and method prior to October 4th, 1872?

A. The answer to question 50 was intended to express that there was no deterioration in quality and the method was substantially the same; the improvement which we supposed had been made was not confirmed by Dewey, Vance & Co.'s orders; if the improvement had been as we supposed Dewey, Vance & Co. would have had no reason to complain.

Q. 300. Then, did your Connellsville coke boss make any substantial or material difference in your method of burning or manufacturing coke?

A. Not much; he made a difference in the drafts; in its results it was not a substantial or material difference.

Q. 301. If, as you have said in answer to question 297, the changes made by the Connellsville coke boss did not make any difference in the appearance which the coke presented on exposure to the weather, why did you say, in your letter of February 8th, 1873, marked Exhibit "T," Complainant's Deposition, "The difference is very apparent on exposure of the coke to the weather, and I am confident that you will find it greatly improved?"

A. Because at the time of writing that letter we had not had experience enough and the coke had not been exposed enough to give it the same appearance of discoloration that it would have had by

longer exposure, as the new coke boss had only been with us a very few days.

Q. 302. Do you mean to say by your last answer that when you wrote that letter you did not then know whether any difference would be apparent or would not on exposure of the coke to the weather?

A. I mean to say that when I wrote that letter I thought the coke was radically better and would not appear like the other coke on the long exposure; I think the coke was burned harder and did not feel the effects of the weather.

Q. 303. Did you know, when you wrote that letter, whether it was true that the difference was apparent on exposure of the coke to the weather?

A. It was true for the time being, but was not true on a further exposure; that is my opinion of the letter and the facts.

Q. 304. Was it true, as stated in that letter with reference to the Connellsville coke boss, that his work was almost entirely different from your former method of manufacture?

271 A. It seemed so, but was not so in final results.

Q. 305. Was the interview of January 31st mentioned in that letter, one of those in which Dewey, Vance & Co. complained to you about the quality of the coke?

A. It might have been; I do not remember.

Q. 306. Was not the change in the contract mentioned in that letter by which you were only to send to Dewey, Vance & Co. six car-loads per week, but in no case to exceed that number without their order, made at the interview of January 31st, 1873, and in pursuance of complaints then made?

A. They had stopped taking coke from us in January, during which month they took only five cars, and that order was a resumption of orders. I can't say that it was made in pursuance of complaints made at that time, as they had stopped taking coke before and took only 22 cars in December and January.

Q. 307. Had you been to Wheeling or had any interview with any member of the firm of Dewey, Vance & Co. between the 13th of December, 1872, and the 31st of January, 1873?

A. I was at the mines between December 15th and 17th, 1872, and I might have gone to Wheeling at the same time, but I have no recollection of doing so. From a remark now made by Mr. Hearne I am convinced that I was not at Wheeling during that trip.

Q. 308. Please state when and for how long periods you were at Fairmont from December 17th, 1872, until December 1st, 1873.

A. I was at the mines somewhere about January 25th or 31st, 1873, for from two to four days; about April 15th for three or four days, and then I was at Fairmont, I think, about the 17th or 18th of July for a day or two and again about August 1st for a day or two; then again in October—about the 24th—for several days.

Q. 309. What experience have you had in the manufacture of coke?

A. None, only at the works of the West Fairmont and Marion Gas Coal Company.

Q. 310. You stated that a portion of the coke delivered to Dewey, Vance & Co. was made from slack taken from a slack heap. How long had that slack heap been lying there?

A. Slack had been thrown upon it very recently—that is, during the spring or summer — 1872. The whole pile had been made within a year or eighteen months.

272 Q. 311. From what mines had that slack been taken?

A. From the same mine as the coal from which the coke was made.

Q. 312. Was not the whole of that slack heap thrown there before you commenced the manufacture of coke?

A. I don't think that it was.

Q. 313. You spoke of having begun to leave a floor in the mines before you did this. What had you been in the habit of doing before that with the impure stratum you have spoken of?

A. If we mined to the bottom of the bank we shipped it the same as any other coal. We were not particular about mining to the bottom, but we were particular to leave a floor after we had once commenced doing so.

Adjourned until May 10, 1880.

The witness, having taken more time to examine his books with reference to question 273, desires to make the following statement:

We cannot tell from our books how much coke was manufactured, but we sold from October 4, 1872, to December 1, 1873, 365 car-loads, 236 of which were to Dewey, Vance & Co., and 126 to other parties. Recapitulating Mr. Davidson's statement, it would make a total of 527 cars manufactured from the time we commenced making coke to 1st of December, 1873, of which Dewey, Vance & Co. had 272 cars and other parties 255 cars, of which there were shipped in—

	Cars.
October, 1872	68
November, 1872	56
December, 1872	21
January, 1873	19
February, 1873	34
March, 1873	42
April, 1873	22
May, 1873	5
June, 1873	2
July, 1873	4
August, 1873	27
September, 1873	26
October, 1873	27
November, 1873	19
Total	372

273 Q. 314. At what prices did you sell the coke which you sold to parties other than Dewey, Vance & Co. between October 4, 1872, and December 1, 1873?

A. I can't answer that question from reference. The prices at which I sold varied from 5½ to 7½ cents per bushel. I may even have got higher than 7½ cents. I have no recollection of selling any at 5½ cents per bushel.

Q. 315. How many ovens did you have begun or finished on October 4, 1872?

A. We started to build fifty ovens; all were completed except one. How many were finished on the 4th of October, 1872, I really don't know.

Q. 316. How many had been begun on or before that date?

A. The ground had been excavated and prepared, I cannot say finished, for the whole number.

Q. 317. You say in your direct examination in answer to question 36, referring to the 4th of October, 1873, that indirectly you had other knowledge in regard to the fitness of your coke for the manufacture of iron than that which you had obtained from Dewey, Vance & Co.; what did you mean by that?

A. Mr. Jackson stated the report from parties who were using it. I likewise think that I saw a letter from Mr. Hardman, and I had talked with E. A. Fitch & Co. on the subject. I don't know what has become of the letter of Mr. Hardman's.

Q. 318. Have you any memoranda by which you fix the date of one of your conversations with Mr. Hearne as having taken place two or three, or possibly four, days prior to the 4th of October, 1872?

A. I have some memoranda which gives the date of my leaving New York and likewise of my return. I know that I was in Columbus on the 3d of October, the day preceding the making of the contract. I may have been there for several days, and in going to Columbus I think I stopped in Zanesville. The way I recollect that I was in Columbus on the 3d is that I telegraphed Dewey, Vance & Co. and waited all day for an answer; not receiving any, I took the train during the night and came to Wheeling, and was here on the morning of the 4th.

Q. 319. You say in your examination-in-chief that information in reference to the coke was received prior to October 4, 1872, by a letter or letters from Dewey, Vance & Co. To what letters do you refer?

A. The letters filed as exhibits with complainant's depositions.

274 Q. 320. Do you know whether George Hardman used Connellsville coke?

A. I understood he did; I don't know.

Q. 321. Did you make affidavits to the answer and cross-bill of the West Fairmont Gas Coal Company filed in this case?

A. I believe I did.

Q. 322. When you said in answer to question 263 that your market became less after October, 1872, than it had been before, mainly because of the increase of new ovens and of the coke manufacture, to what new ovens and coke manufacture did you refer?

A. All over the country in the coke regions; mainly Connellsville, Steubenville, and along the Baltimore and Ohio railroad line.

Q. 323. How many interviews did you have with Dewey, Vance & Co. or any member of the firm between December, 1872, and December, 1873?

A. I don't know; I had several interviews during that period.

Q. 324. At the interviews mentioned in the last answer what was the character of the complaints, if any, made by Dewey, Vance & Co. with reference to the coke?

(Objected to.)

A. I have no definite recollection of those interviews, but the general complaint, and I think almost the only one, was too much sulphur.

Q. 325. Was that complaint made at the last-named interviews by Mr. Hearne, Sr., or Mr. Frank Hearne?

A. It may have been made by either or both.

Q. 326. At what intervals apart were the last-named interviews?

A. At intervals of several months.

Recess until 2 p. m.

Q. 327. Did you know before you began to ship coke to Dewey, Vance & Co. that they were carrying on the busines of making pig iron?

A. Yes.

Q. 328. You say in your examination-in-chief that at the time when the contract was made with Dewey, Vance & Co. the capacity of your works for making coke was twenty car-loads per week and in your cross-examination you said you did not know how
275 many ovens had been completed at that time; how could you tell what your capacity was without knowing how many ovens you had?

A. In another part of the cross-examination I have stated how many ovens were done at a given date when I left the works, when the front wall was up for 29½ ovens—that is, a month or six weeks prior to the making of the contract with Dewey, Vance & Co., and within that time we could have completed, and I suppose did, a greater number than was necessary to give over three car-loads of coke per day; from the fact that they requested us to send them four car-loads of coke per day, and our compliance with that request to a certaint extent, I know that such was the fact.

Q. 329. How many ovens did you complete within the month or six weeks last referred to?

A. I have no recollection of counting, although I probably did many a time.

Q. 330. How many could you have completed within that time?

A. I think we could have completed about the whole of them if we had tried.

Q. 331. Can you say about how many you did complete within that time?

A. Enough, with what we already had, to give them between three and four car-loads per day; I think there were between 35 and 40 ovens in blast.

Q. 332. Did you ever put in blast the whole 49 ovens which you said you completed?

A. We never had 49 ovens in blast at any one time, and I doubt if some at the end of the row were ever fired up.

Q. 333. Did you have in operation during October, 1872, and throughout that month, the whole of the 35 or 40 ovens which had been completed before the contract was made?

A. We did; I cannot say for the whole length of time or what portion of it; I think we had them all in operation during the whole of that month.

Q. 334. Did you furnish coke to any other persons during the month of October, 1872?

A. Yes; we shipped five car-loads to other parties; the total product of the month of October, including the first four days, was 68 car-loads; during the first four days of October Dewey, Vance & Co. had seven car-loads.

Q. 335. In saying three car-loads per day did you mean to include or exclude Sundays?

276 A. I meant to exclude Sundays; in the calculations with Dewey, Vance & Co. Sundays were excluded.

Q. 336. How many car-loads of coke did you produce in October, 1872, over and above the 68 car-loads which you shipped, if any?

A. Considerable in excess, but how much I cannot tell, as there was no record; referring to Exhibit "D" of complainant's depositions, I think we had between 20 and 30 car-loads in excess of what we shipped.

Q. 337. What would have been the entire producing capacity of your whole 49 ovens, supposing that you would have had slack enough to supply them?

A. Between four and five cars per day.

Redirect-examination:

Q. 338. Please state whether, in your answer to the 93d and subsequent questions, you are to be understood as giving an opinion merely, or whether your estimate of the value of the contract was based on any calculation.

A. It was based on calculations.

Q. 339. What do you mean by "merchantable coal" as used in these depositions?

A. Coal that was small and would screen out with a coarse screen, but would be retained and go with the coal shipped over a fine screen; all coarser coal is, of course, merchantable; the other is what I have been talking about in these depositions.

Q. 340. By the use of the term "merchantable coal" in this deposition have you intended to indicate any difference of quality with respect to the purity of the coal or its fitness for coke?

A. No difference as to purity; merchantable coal, or such coal as we ship, is usually in such large lumps that it is not desirable to use it for coke; the large lumps are not different in quality, but are inconvenient to use and do not carbonize as quickly and freely in the ovens as fine coal.

Q. 341. Referring to your answer to question 293, I ask you whether coke, obtained from slack is different in quality or value in any respect from that obtained from merchantable coal, supposing the slack and coal to be equally free from sulphur or other deleterious substances.

A. No difference.

Q. 342. What is the difference between coal and slack?

277 A. Slack is coal, but the slack is simply fine coal which many purchasers refuse to accept as merchantable.

Q. 343. What is the material used in the manufacture of coke by coke manufacturers generally who are engaged in selling or shipping coal?

A. Screenings.

Q. 344. At the time of making the contract with Dewey, Vance & Co. did that firm know what business your company was engaged in at Fairmont and what material your coke was manufactured from?

A. They certainly knew what business we were engaged in. From the previous conversations I suppose they understood the matter thoroughly. I can't recall any particular conversation, but the whole matter was talked over thoroughly.

Q. 345. If coal in large lumps be used in the manufacture of coke is any preparation of it necessary?

A. Coal that carbonizes as hard as ours and if we were going to make coke from "run of mine" regularly we would have the coal mined as fine as we could, and perhaps have it broke up; but using a little only occasionally we let it as it came out of the mine.

Q. 346. Referring to questions 311 and 312, please state whether, for the purpose of making coke, slack would suffer any deterioration by exposure for a few weeks or months to the weather.

A. If it does not heat I do not believe that it would.

Q. 347. Referring to question 314, please state to what extent the lower stratum of your coal vein, which you say was finally left as the floor of your mine, was mingled with impure matter; in respect to purity was it essentially different from the main body of the vein?

A. That floor was started by Mr. Jackson, and I saw him when I was out on Saturday of last week, and he said that it made very little difference and that it was not a material improvement. I always thought that it made an improvement, but that is what he says, and he has been making coke off and on ever since. I don't know anything positive about that stratum, but I believe that coal for gas purposes is of a better quality slightly without it than with it.

(That part of the answer relating to what Mr. Jackson says objected to.)

Q. 348. Can you now state what was the outside cost, including every element of cost, of producing the 246 car-loads of

278 coke and loading it upon the cars which was actually delivered to Dewey, Vance & Co. under the contract?

A. Including every item of cost applicable to coke I don't think that it cost us over 2¾ cts., and having figured on the cost of coke hundreds of times I am well satisfied that it did not cost over that.

Q. 349. How would the outside cost, by which I mean the extreme cost per bushel, of producing and loading into the cars the 436 car-loads which remain undelivered have differed from the cost named in your last answer, if it would have differed at all?

A. If we could have worked systematically and regularly the cost would probably have been less.

Q. 350. Well, I mean supposing it had been received at the rate of 3 car-loads per day?

A. It would have been no more than the figure I have named; it would probably have been less.

Q. 351. Can you state what would have been your clear profit on the said 436 car-loads, having reference to and deducting the outside cost of production and loading in the cars, and having reference also to all contingencies which might have diminished the profit?

A. Notwithstanding all the figures, it is my firm belief to-day that if that contract had been carried out we would have made about $9,000 out of the 436 car-loads of coke undelivered.

Q. 352. Could your actual outlay in the production of coke be exactly separated from your outlay in other elements or branches of your mining business?

A. No; the coke business was entirely irregular; it was a side issue and it had nothing to do with the conducting of the other business.

Q. 353. Do you mean by that that the coke business was entirely separate from your general business?

A. I mean that our organization was for another purpose and we took this up in addition with the hopes of making some money out it.

Q. 354. In your answer to the 353rd question you say that it had nothing to do with the conducting of the other business; then why can you not separate and state exactly the outlay incurred in the manufacture of coke?

A. The previous questions were not thoroughly understood. There were accounts kept for the coke business, wherein the labor
279 and expense were charged to it. Those accounts, as far as kept, are on the books at New York and I have no memorandum or account.

Q. 355. Now, please state how your damages, occasioned by the failure of Dewey, Vance & Co. to receive the 436 car-loads of coke, correspond in amount to the clear profit which you say would have been made upon the same.

A. The damages are greater than the amount of profits would have been on the coke for the reason that we manufactured a large amount of coke, exceeding 50 car-loads, which they did not take, and which remained on the yard until it became black spotted and in consequence unmerchantable, and it had to be used up, thrown away, carted over the railroad and dumped, resulting in almost a total loss. Some of it was sold to some parties who "busted up"

and we never got anything for it. Some was used in heating the ovens to get it out of the way—used in the place of slack. I don't think we ever realized $10.00 out of it, and it cost us a greater sum than that to get it out of the way.

Q. 356. Can you state any sum of money, in dollars and cents, below which your damages would not fall?

A. Yes; I think that they are in excess of the largest figures I have named in answer to their bill of complaint, which was $10,000.

Q. 357. Were the current or other expenses of your business increased by the manufacture of coke beyond the additional labor in manufacturing and handling it?

A. In some trifling cases, such as traveling expenses occasioned for that particular purpose, they were.

Q. 358. In your estimate of the cost of manufacturing the coke and loading it into the cars at 2½ to 2¾ cents per bushel, which of the elements of cost enumerated in your answer to question 106 have you included?

A. All of them.

Q. 359. Are the advantages referred to by you in your answer to question 251 capable of being expressed in dollars and cents?

A. I should say hardly.

Q. 360. Can you now state at what time the fine screen referred to in your cross-examination was first made use of?

A. After we stopped making coke we put in two screens, the coarse one above and the fine one below, and that was the first of using two screens in the same chute. Previous, and while
280 making coke, there was but one screen in the chute and that generally a coarse one. I supposed, in testifying the other day, that the two screens had been used previous to or while making the coke, but in talking with Mr. Jackson, who was then agent, he says that there was only one screen in each chute, and I am convinced that his statement is correct.

Q. 361. Referring now to question 307, please state whether any change was ever made in the contract between your company and Dewey, Vance & Co.

A. No, sir; the change is implied by question and not by answer.

Adjourned to May 11, 1880.

Recross-examination:

Q. 362. If you did not use two screens and did not use the fine screen during the time when you manufactured coke what was it that induced the change?

A. The two-screen system, the coarse one above and the fine one below, was introduced for the purpose of more effectually cleaning the coal of very fine slack and retaining all the larger pieces that would not pass through the fine screen. It was simply a matter of economy to reduce waste.

Q. 363. What was the date of that change?

A. I consulted with Mr. Jackson about it and we could not fix upon a date when that was done. It was after he left our employ,

and my belief is it was from one to two years after the date of the contract with Dewey, Vance & Co.

Q. 364. After you began to use two screens what became of the coal which passed through the coarse screen and was retained by and did not pass through the fine one?

A. It was shipped with the other coal.

Q. 365. While you were manufacturing coke what became of the coal of the same size as that referred to in the last question?

A. On the organization of the company, or shortly after, which was about the 1st of November, 1870, we commenced shipping coal to Chicago. That coal was screened over a single screen and the screenings or slack was thrown away. All Western coal and some Eastern coal was screened. In shipping to various points or sections and for various purposes it appears we used several different sizes of screens, but only a single screen, and the coal that passed through the screen prior to our commencement to make coke was thrown away. After we began to manufacture coke the coal referred to was used in the manufacture of coke.

281 Q. 366. What were the respective sizes of the coarse and fine screens used after you began to use two at once and the various screens used while you were manufacturing coke?

A. On investigation last Friday and Saturday, 2¾ inches appears to be the coarsest screen we ever used, and the fine one about ⅝ or ¾ of an inch, not exceeding ⅞. While we were making coke I believe we used screens from an inch and a half to two and three-quarters.

Q. 367. You spoke on yesterday of coal or slack burning sometimes when exposed to the weather; please tell us what you know about that.

A. Several years since we shipped some coal to New York, and it was put under cover when it was slightly damp, piled ten to twenty feet high, and piled by running a car over the top of it on tressel — feet from the floor, and that car was emptied in one spot until the pile would get nearly up to the track, which packed the coal under the car very close. That coal ignited or fired by spontaneous combustion. Likewise, at the mines we had a slack heap a year or two since upon which snow would not lay as it would always melt, and several times we played water on that pile for fear it might ignite; that is all the positive knowledge I have. At the same time that our coal fired in New York I was informed that a pile of "Waverly" coal in the yard of the Manhattan Gaslight Company of New York, and piled only about ten or twelve feet high, ignited or fired spontaneously and had to be removed. A similar circumstance occurred at Troy, N. Y., seven or eight years ago, and fifteen or twenty years ago a similar circumstance occurred in Brooklyn, at the Brooklyn City Gaslight Company's Works.

Q. 368. In cases where the spontaneous combustion of coal or slack takes place is the process a sudden or gradual one?

A. Slow and very gradual; it is supposed to arise from very fine coal damp and densely packed by repeated dumpage of load after load from an elevation on the same spot.

Q. 369. Did you have a coke contract with Fitch & Co.?

A. We had several; some of which were carried out, some not.

Q. 370. Were those contracts verbal or in writing?

A. Verbal.

Q. 371. Did you have any before or during the time when you were shipping to Dewey, Vance & Co.?

A. We had a contract with them of some kind before we commenced shipping to Dewey, Vance & Co.; we likewise sold them coke while we were shipping to Dewey, Vance & Co.

282 Q. 372. What were your contracts with Fitch & Co. before and during the time when you were shipping to Dewey, Vance & Co.?

Objected to for irrelevancy.

A. I have no recollection of the contract prior to the contract with Dewey, Vance & Co.; neither do I recollect the particulars of our sales to them after the contract was made with Dewey, Vance & Co.

Q. 373. Was the contract with Fitch & Co., which you had prior to that of Dewey, Vance & Co., carried out?

Objected to.

A. Yes; as it was an open contract, not a contract for a special length of time.

Q. 374. You said that in estimating the cost of the 246 car-loads of coke which were shipped to Dewey, Vance & Co. you took no account of the discount on Dewey, Vance & Co.'s notes; why did you leave that discount out of consideration?

A. Because it was so near the basis of a great many of our collections. We sold Hardman on time and used to take his notes, and on open account they would frequently promise to pay in a short time, and it would be often a long time before we would get the money.

Q. 375. Was it because you did not have Dewey, Vance & Co.'s notes discounted?

A. No; because we had some of their notes discounted.

And further this deponent sayeth not.

GILBERT R. VAN ALEN.

283 And on another day, to wit, on the 18th day of January, A. D. 1881, at a circuit court of the United States for the district of West Virginia, held at Parkersburg, in said district, on that day, the follow-g was entered of record, to wit:

DEWEY, VANCE AND COMPANY
vs.
THE WEST FAIRMOUNT GAS COAL COMPANY and Others. } In Chancery.

It is agreed that the above-entitled cause may, upon the fil-ng of this agreement, be submitted to the court at its present session upon the arguments in print.

Wheeling, January 12th, 1881.

WM. P. HUBBARD,
For Def'ts.
HENRY M. RUSSELL,
Counsel for Pl't'fs.

And on another day, to wit, on the 11th day of April, A. D. 1881, the following order was passed by said court, to wit:

CHAUNCEY DEWEY and Others
vs.
THE WEST FAIRMOUNT GAS COAL COMPANY and Others. } In Chancery.

284 This cause came on again to be further heard at this term and was argued by counsel; upon consideration whereof it is ordered that a jury be empanelled at the bar of this court to try the follow-ng issue:

First. Whether the complainants, Dewey, Vance and Company, have failed to perform the contract set forth in the pleadings in this suit so far as the same should have been performed on their part, and, if so, whether the West Fairmount Gas Coal Company is entitled to recover any damages, and, if so, what amount, from the said complainant-, Dewey, Vance and Company, by reason of said failure.

Second. Whether the said West Fairmount Gas Coal Company has failed to perform the said contract so far as the same should have been performed on its part, and, if so, whether the complainants, Dewey, Vance and Company, are entitled to recover any damages, and, if any, what amount, from the said West Fairmount Gas Coal Company by reason of such failure.

On the trial of said issues the said West Fairmount Gas Coal Company shall be the plaintiff and the said Dewey, Vance and Company shall be the defendants; and leave is given to the
285 parties to read to the jury on the trial of the said issues any or all of the pleadings in this suit, and any or all of the evidence now on file in this suit, so far as the same may be relevant or proper, or to introduce the oral testimony of any witness instead of his deposition, and to introduce any additional relevant and competent testimony.

And on another day, to wit, at a circuit court of the United States for the district of West Virginia, continued and held at Parkersburg, in said district, on the 28th day of March, A. D. 1884, the following decree was passed and entered of record, to wit:

CHAUNCEY DEWEY and Others
vs.
THE WEST FAIRMOUNT GAS COAL COMPANY and Others. } In Equity.

and

THE WEST FAIRMOUNT GAS COAL COMPANY
vs.
CHAUNCEY DEWEY and Others. } Cross-Bill.

By consent of parties, by their counsel, the order directing an issue to be tried by a jury, which was entered herein on 11th
286 day of April, A. D. 1881, is set aside and the cause is submitted to the court.

This cause came on to be further heard and was argued by counsel, and thereupon, upon consideration thereof, the court being of opinion that the complainants, Dewey, Vance and Company, have not suffered any damages, as in their bill is alleged, and that the equity of the causes is with the defendants, The West Fairmount Gas Coal Company and others—

It is ordered, adjudged, and decreed that the injunction heretofore awarded herein be dissolved; that the bill of complainants, Dewey, Vance and Company, be dismissed, and that the said complainants do pay to the said defendants their costs about their defence in this behalf expended, and leave is hereby given to issue execution therefor.

It is further ordered, adjudged, and decreed that the said cross-bill be dismissed, but that the said West Fairmount Gas Coal Company recover its cost expended in the prosecution of said cross-bill.

Thereupon the said complainants, Dewey, Vance and Company, moved the court to allow them an appeal from the foregoing decree dissolving the said injunction and dismissing their said bill,
287 to operate as a supersedæs to said decree. Upon consideration whereof an appeal from the said decree to the Supreme Court of the United States is hereby granted, upon the said last-named complainants or some one of them, or some one on their behalf, giving bond with good security, to be approved by this court or one of the judges thereof, in a penalty of one thousand dollars, conditioned according to law.

And on another day, to wit, on the 2d day of May, 1884, at a circuit court of the United States held on that day, the following decree was passed, to wit:

CHAUNCY DEWEY and Others
vs.
THE WEST FAIRMOUNT GAS COAL COMPANY and Others. } In Equity.

and

THE WEST FAIRMOUNT GAS COAL COMPANY
vs.
CHAUNCEY DEWEY and Others. } In Equity upon a Cross-Bill.

This day came James Morrow, Jr., Esquire, counsel for the complainant, The West Fairmount Gas Coal Company, in the above-entitled cross-bill, and desiring an appeal from the order heretofore entered dismissing the cross-bill in this cause.

288 Upon consideration whereof an appeal from said order to the Supreme Court of the United States is hereby granted upon the said complainant or some one on their behalf giving bond with good security, to be approved by this court or one of the judges thereof, in a penalty of five hundred dollars conditioned according to law.

289 Know all men by these presents that we, William L. Hearne and John D. Culbertson, of the city of Wheeling, in the State of West Virginia, as princ-pal-, and John J. Jones, of the same city, as

surety, are held and firmly bound unto the West Fairmount Gas Coal Company, a corporation of the State of New York, the West Fairmount and Marion Consolidated Gas Coal Company, a corporation of the State of New York, and Gilbert R. Van Alen in the full and just sum of one thousand dollars, to be paid to the said The West Fairmount Gas Coal Company, the said West Fairmount and Marion Consolidated Gas Coal Company, and the said Gilbert R. Van Alen, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this first day of April, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately, at a circuit court of the United States for the district of West Virginia, held on the 28th day of March, A. D., 1884, in a suit depending in said court between Chauncy Dewey, Charles P. Dewey, Albert Dewey, Orville C. Dewey, David M. Thornbery, James N. Vance, John D. Culbertson, A. C. McKee, Nathan Wilkinson, Wm. L. Hearne. F. J. Hearne, L. Jones, C. Rohr, J. Dudley, J. Nesbitt, R. McClellan, Jacob Bowman, F. Linderman, H. M. Babcock, M. Smith, & James Bellville, surv'ng partners of the firm of Dewey, Vance & Co., complainants in chancery, & the above-named obligors, def'ts, a decree was rendered against the said complainants dismissing their bill and dissolving the injunction theretofore awarded them in said suit & requiring said complainants to pay the costs of said suit, and the said complainants having obtained an appeal & supersed-as from said circuit court to reverse the said decree in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said complainants shall prosecute the said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

WM. L. HEARNE. [SEAL.]
JNO. D. CULBERTSON. [SEAL.]
JNO. J. JONES. [SEAL.]

Sealed and delivered in presence of—
HANNIBAL FOBES,
U. S. Com'r.

Approved as a supersed*æs* bond.
J. J. JACKSON,
Judge D. C., U. S. D., W. Va.

APRIL 4, 1884.

Filed in office this 4th day of April, 1884.
L. B. DELLECKER, *Clerk.*

290 Know all men by these presents that I, James Morrow, Jr., on behalf of the West Fairmount Gas Coal Company, am

held and firmly bound unto Chauncy Dewey, Charles P. Dewey, Albert Dewey, Orville C. Dewey, David M. Thornbury, Jas. N. Vance, J. D. Culbertson, A. C. McKee, N. Wilkinson, Wm. L. Hearne, F. J. Hearne, L. Jones, C. Rohr, J. Dudley, J. Nesbitt, R. McClellan, J. Bowman, Fred-rick Linderman, H. M. Babcock, M. Smith, & Jas. Bellville, surv'ng partners of the firm of Dewey, Vance & Co., in the full and just sum of five hundred dollars, to be paid to the said Chauncy Dewey and the obligees hereinabove named, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with my seal and dated this 31st day of May, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately, at a circuit court of the United States for the district of West Virginia, held on the 28th day of March, A. D. 1884, in a suit depending in said court *between* the West Fairmount Gas Coal Company, the West Fairmount and Marion Consolidated Gas Coal Company, and Gilbert R. Van Alen were defendants, and the obligees above named were complainants, and the said defendant, The West Fairmount Gas Coal Company, was also complainant in a cross-bill filed in said cause against the said firm of Dewey, Vance & Co., decree was rendered against the said The West Fairmount Gas Coal Company dismissing the said cross-bill, and the said The West Fairmount Gas Coal Company having obtained an appeal from said circuit court to reverse the order or decree dismissing said cross-bill in the aforesaid suit, and a citation directed to the said defendants in said cross-bill citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said The West Fairmount Gas Coal Company shall prosecute their said appeal to effect and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

JAMES MORROW, JR. [SEAL.]

Approved by—

J. J. JACKSON, *D. J.*

Endorsement: "Filed in office this 2d day of June, 1884." L. B. Dellecker, clerk.

291 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the district of West Virginia, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Dewey, Vance & Co, plaintiffs, and The West Fairmount Gas Coal Co., defendants, a manifest error hath happened, to the

great damage of the said plaintiffs, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 4th day of April, in the year of our Lord one thousand eight hundred and eighty-four.

{ Seal Circuit Court United States, District West Virginia, Parkersburg, West Va. }

L. B. DELLICKER,
Clerk of the Circuit Court of the United States for the District of West Virginia.

Allowed by—
J. J. JACKSON,
Judge D. C. U. S., W. V.

April 4, 1884.

[Endorsed:] No. —. Circuit court United States for the district of West Virginia. Appeal. Chauncy Dewey *et al. vs.* West Fairmount Gas C. Co. Circuit Court U. S., dist. W. Va. Filed in office this 4th day of April, 1884. L. B. Dellicker, clerk.

292 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the district of West Virginia, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between The West Fairmount Gas Coal Company, plaintiffs, and Chauncy Dewey and others, upon a cross-bill, a manifest error hath happened, to the great damage of the said plaintiff, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further

to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the second day of May, in the year of our Lord one thousand eight hundred and eighty-four.

{Seal Circuit Court United States, District West Virginia, Parkersburg, West Va.}

L. B. DELLICKER,
Clerk of the Circuit Court of the United States, District of West Virginia.

Allowed by—
J. J. JACKSON, *D. J.*

[Endorsed:] Circuit court United States for the district of West Virginia. The West Fairmount Gas C. Co. *vs.* Dewey, Vance & Co. Appeal. Circuit court U. S., dist. W. Va. Filed in office this 2d day of May, 1884. L. B. Dellicker, clerk. No. —. Circuit court United States for the district of West Virginia.

293 The United States of America to the West Fairmount Gas Coal Company, West Fairmount and Marion Consolidated Gas Company, and Gilbert R. Van Allen, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of West Virginia, wherein Chauncy Dewey, Charles P. Dewey, Albert Dewey, Orville C. Dewey, David M. Thornbury, James N. Vance, John D. Culbertson, Arthur C. McVee, Nathan Wilkinson, William L. Hearne, Frank J. Hearne, Lewis Jones, Charles Rohr, Joseph Dudly, James Nesbitt, Robert McClellan, Jacob Bowman, Fredrick Linderman, Henry M. Babcock, & James Bellville, surv'ng partners of the firm of Dewey, Vance & Company, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the *of the* United States, this 4th day of April, in the year of our Lord one thousand eight hundred and eighty-four.

{Seal Circuit Court United States, District West Virginia, Parkersburg, West Va}

Test: L. B. DELLICKER,
Clerk Circuit Court U. S., Dist. W. Va.

293½ On this — day of ——, in the year of our Lord one thousand eight hundred and —, personally appeared —— ——, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to —— ——.

Sworn to and subscribed the — ——, A. D. 18—.

—— ——.

I hereby accept service of the within process for and in behalf of the West Fairmont and Marion Consolidated Gas Coal Company and for the West Fairmont Gas Coal Company.
9th April, 1884.

JAMES MORROW, Jr.,
Attorney for the Companies Named in the Above Acknowledgment of Service.

I hereby, this 3d May, 1884, accept service of the within process for and on behalf of Gilbert R. Van Alen, within named.

JAMES MORROW, Jr.,
Attorney & Counsel for G. R. Van Alen.

294 The United States of America to Chauncey Dewey, Charles P. Dewey, Albert Dewey, Orville C. Dewey, David M. Thornbury, James N. Vance, John D. Culbertson, Arthur C. McKee, Nathan Wilkinson, William L. Hearne, Frank J. Hearne, Lewis Jones, Charles Rohr, Joseph Dudley, James Nesbitt, Robert McClellan, Jacob Bowman, Fredric Lenderman, Henry M. Babcock, Martin Smith, and James Bellville, surv'g partners of the firm of Dewey, Vance & Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of West Virginia, wherein the West Fairmount Gas Coal Company are app'l'ants and you are app'l'ee, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 3d day of June, in the year of our Lord one thousand eight hundred and eighty-four.

Teste:

L. B. DELLICKER,
Clerk Circuit Court U. S., Dist. W. Va.

294½ On this — day of ——, in the year of our Lord one thousand eight hundred and eighty- —, personally appeared —— —— before me, the subscriber, and makes oath that he delivered a true copy of the within citation to ——.

Sworn to and subscribed the — ——, A. D. 188–.

—— ——.

[Endorsed:] Circuit court U. S., dist. W. Va. Filed in office this 2 day of July, 1884. L. B. Dellicker, clerk.

Accept service of the within writ this 14th day of June, A. D. 1884, for the within-named appellees.

WM. H. HEARNE,
Att'y for Appellees.

295 I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do certify that the foregoing is a true transcript of the record and proceedings had in the case of Chauncey Dewey and others against the West Fairmount Gas Coal Company and others, in equity, and the West Fairmount Gas Coal Company against Dewey, Vance and Company, upon a cross-bill, now of record and on file in my office.

In testimony whereof I hereunto set my hand and the seal of said court, at Parkersburg, in said district, this 21st day of August, A. D. 1884.

(Seal Circuit Court United States, District West Virginia, Parkersburg, West Va.)

L. B. DELLICKER,
Clerk Circuit Court U. S., Dist. W. Va.

Endorsed on cover: West Virginia. C. C. U. S. No. 60. Chauncey Dewey, Charles P. Dewey, Albert Dewey, Orville C. Dewey, David M. Thornbury, *et al.*, surviving partners of the firm of Dewey, Vance & Company, appellants, *vs.* The West Fairmount Gas Coal Company, The West Fairmount and Marion Consolidated Gas Coal Company, and Gilbert R. Van Alen. Filed 3rd October, 1884—and No. 179. The West Fairmont Gas Coal Company, appellant, *vs.* Chauncey Dewey, Charles P. Dewey, Albert Dewey, Orville C. Dewey, David M. Thornbury, *et al.*, surviving partners of the firm of Dewey, Vance & Company. Filed 8th November, 1884.

128-329

RECEIVED
OCT 28 1887
JAMES H. MCKENNEY
CLERK

SUPREME COURT

OF THE

UNITED STATES.

NO. 60.

CHAUNCEY DEWEY, CHARLES P. DEWEY, ALBERT DEWEY, ORVILLE C. DEWEY, DAVID M. THORNBURG and others, surviving partners of the firm of Dewey, Vance & Company, Appellants,

vs.

THE WEST FAIRMONT GAS COAL COMPANY, THE WEST FAIRMONT AND MARION CONSOLIDATED GAS COAL COMPANY AND GILBERT R. VAN ALEN.

NO. 179.

THE WEST FAIRMONT GAS COAL COMPANY, Appellant,

vs.

CHAUNCEY DEWEY, CHARLES P. DEWEY, ALBERT DEWEY, ORVILLE C. DEWEY, DAVID M. THORNBURG, and others, surviving partners of the firm of Dewey, Vance & Company.

BRIEF FOR DEWEY, VANCE & CO.

SUPREME COURT

OF THE

UNITED STATES.

NO. 60.

CHAUNCEY DEWEY, CHARLES P. DEWEY, ALBERT DEWEY, ORVILLE C. DEWEY, DAVID M. THORNBURG and others, surviving partners of the firm of Dewey, Vance & Company, Appellants,

vs.

THE WEST FAIRMONT GAS COAL COMPANY, THE WEST FAIRMONT AND MARION CONSOLIDATED GAS COAL COMPANY AND GILBERT R. VAN ALEN.

NO. 179.

THE WEST FAIRMONT GAS COAL COMPANY, Appellant,

vs.

CHAUNCEY DEWEY, CHARLES P. DEWEY, ALBERT DEWEY, ORVILLE C. DEWEY, DAVID M. THORNBURG, and others, surviving partners of the firm of Dewey, Vance & Company.

BRIEF FOR DEWEY, VANCE & CO.

STATEMENT OF THE CASE.

In February, 1872, Dewey, Vance & Company began the manufacture of pig iron at their furnace near Wheeling, using in the manufacture large quantities of coke. In the latter part of the previous year, the West Fairmont Gas Coal Company had begun

the manufacture of coke at Fairmont, beginning with a small number of ovens, and gradually increasing the number until in the summer of 1872, it had, either complete or partially completed, between forty and fifty coke ovens, of a sufficient capacity to produce four or five car loads of coke daily. In August, 1872, Mr. Van Allen, the president of the principal defendant, exhibited to the plaintiffs a sample of coke from his ovens, and stated to them that his coke had certain qualities which peculiarly fitted it for use in the manufacture of pig iron. These qualities were some of them of such a nature that the presence or absence of them could not be detected by inspection. He then arranged with the plaintiffs that his company should furnish them a "trial lot," which the plaintiffs should use in their furnace, with the purpose on both sides that if the "trial lot" should prove satisfactory, a contract should be entered into for the delivery of a large quantity of coke. On October 4th, the "trial lot" had been partially used, and Mr. Van Alen repeated his representations as to the character of the coke which would be manufactured and delivered, and thereupon in reliance upon the "trial lot" as a sample, and also upon the representations made, a verbal contract was entered into for the delivery of "an average" of three car loads of coke daily, from October 4, 1872, to July 1, 1872. This contract was afterward ratified by letter.

Soon after the deliveries under the contract began, the quality of the coke deteriorated, and after complaints had been made by the plaintiffs and promises had been made by the principal defendant to restore the quality of the coke, and after these complaints had been reiterated during a number of months, the plaintiffs finally refused to receive any more coke under the contract.

In the meanwhile, 246 car loads of coke had been delivered and paid for. The plaintiffs first tried to use a considerable proportion of the Fairmont coke in their furnace, and finding the results bad, they made the proportion less and less. Notwithstanding this, however, the inferiority of the coke affected the quality of the iron produced, and the working of the furnace. During the period when the plaintiffs were vainly endeavoring to use the Fairmont code in small proportions, they were compelled to purchase other coke at an increased cost, to take the place of the Fairmont coke which they might have used if the latter had been either equal to the sample or of good merchantable quality, fit for the purpose for which it was contracted for. The plaintiffs, therefore, claim to have

been damaged by the increased expenditure for coke on the one hand, and on the other by the use of the coke which was delivered and paid for.

The West Fairmont Gas Coal Company, after waiting until its supposed cause of action was nearly barred, began action at law against the plaintiffs to recover damages for the failure to receive the coke which had been contracted for and not delivered. In this action at law, which was begun in the State Court, the present plaintiffs attempted to interpose, under the West Virginia Statute relating to equitable set-off, its two claims for damages, for the purpose as well of defeating the recovery against them, as of recovering over against its opponent. These claims of the plaintiffs were presented in that action in two separate pleas, both of which, however, were rejected by the State Court, and the general issue having been pleaded, the West Fairmont Gas Coal Company removed the action to the Circuit Court of the United States for the District of West Virginia.

The plaintiffs having been thus shut off from their defense at law, and the West Fairmont Gas Coal Company being insolvent, the plaintiffs filed their bill in the Circuit Court of the United States for the District of West Virginia, setting up their claims, denying any liability on their part to the West Fairmont Gas Coal Company, alleging the insolvency of that Company and a conveyance of all its property, which was at least constructively fraudulent, and praying that their claims might be established and that the action at law might be enjoined. A preliminary injunction was granted, the case was elaborately prepared on the proofs, and on the final hearing, the bill of the plaintiffs was dismissed. A cross bill which had been filed by the West Fairmont Gas Coal Company and which asserted substantially the same claims made in the action at law, was also dismissed. Both parties have appealed.

ARGUMENT.

I. Pleas to the jurisdiction of the Circuit Court of the United States were filed, and were overruled by the court. These pleas were based on the suggestion that some of the defendants to the bill were citizens of the same state with the plaintiffs.

This suit was ancillary to the action at law of which the Circuit Court of the United States already had undoubted jurisdiction;

numerous decisions of this court establish the rule that such a suit will be entertained without regard to the citizenship of the parties.

Railway Co. vs. Railway Co., 111 *U. S.* 506;
Krippendorf vs. Hyde, 110 *U. S.* 276;
Jones vs. Andrews, 10 *Wallace* 327.

II. On the argument of the demurrer in the court below, it was urged that the case was not a proper one for an injunction, nor for the exercise of equitable jurisdiction.

1. The defendant claimed that an injunction was not proper, because a judgment had not been confessed at law. When an injunction to proceedings at law is applied for on some ground which admits the right of the plaintiff at law to a judgment, but seeks to avoid the effect of the legal liability on some purely equitable consideration, then an injunction should not be granted unless upon condition that the judgment shall be confessed at law. But where the person who applies for the injunction denies his legal liability, and has also an equitable defense, the rule does not obtain, and an injunction will be allowed without a confession of judgment.

Great Falls Manf. Co. vs. Henry, 25 *Gratt.* 575.

2. If the plaintiffs' claims in this case be regarded as off-sets, and the claims of the two parties as distinct, though mutual, there are cases of authority which hold that the insolvency of the defendant constitutes a sufficient reason for the exercise of equitable jurisdiction.

Lindsay vs. Jackson, 2 *Paige* 581;
Gay vs. Gay, 10 *Paige*, 368;
Hudson vs. Kline, 9 *Gratt.* 379.

3. It is impossible, however, to regard the claims of the plaintiffs as offsets, as that term is strictly and properly applied. They grow out of the failure of the defendant to perform the very contract upon which it sues at law. The plaintiffs claim to recover damages because of the defects in the coke furnished and paid for, is a claim which could be used at law, by the aid of the doctrine of recoupment, for the purpose of defeating the defendant's action at law, but no recovery over could be had upon it. The claim made by the plaintiffs that they were injured because of the failure of the defendant to furnish the amount of coke contracted for, of the proper quality, could be used to defeat the action at law as showing a failure of consideration, but no recovery over could be had upon it in the same action.

Claims of this nature stand upon a very different footing from mere off-sets. They might, it is true, be made the basis of a cross action at law. When used for that purpose, they can not, however, be at the same time used for the purpose of defeating the action brought by the other party. On the other hand, if used to defeat the action brought by the other party, they can not afterward be made the basis of another action for the recovery of damages. When the present defendant sued at law, the plaintiffs, therefore, were placed, so far as their legal remedies were concerned, in this situation: If they excused their failure to comply with their contract by showing that they had been damaged by the defects in the coke, and by recouping these damrges, and if they showed as a further excuse that the defendant did not furnish them with coke of the proper quality, they might, it is true, have defeated the action, but there they must have stopped. If, instead of using these claims as defenses to the action, they had reserved them for the basis of a cross-action, they ran the risk of having a recovery against them, while, by reason of its insolvency, the defendant would escape from the payment of a portion or all of the judgment in the cross-action. Under these circumstances, it is manifest that the remedy at law was entirely inadequate to the exigencies of the case, and that equity might properly take jurisdiction.

Lead. Cas. in Eq., 4th Ed., Vol. II, Part II, page 1343;

Ragsdale vs. Hagy, 9 *Gratt.* 409;

Jaynes vs. Brock, 10 *Gratt.* 211.

The principle here adduced is analagous to that which was applied by this court in *Drexel vs. Berney*, 122 *U. S.* 241.

4. The Statute of West Virginia, which came to us from the legislation of the Mother State, permits the filing in actions at law of certain pleas which are known as pleas of "equitable set-off." While the defendant's action at law was in the State Court, two pleas were tendered, setting up the two claims of the plaintiffs which have been alluded to. On page 80 of the printed record there is a copy of a plea which was first tendered, and which was rejected for duplicity. The two pleas mentioned in the bill were similar to this, except that the claims were severed and pleaded separately. The purpose of the plaintiffs in offering these pleas was to avoid the difficulty of which mention has been made, and to obtain the benefit of their claim, not only as defenses to the action, but as the basis for the recovery of damages. These pleas

were rejected by the State Court on the ground that the statute did not extend far enough to allow the filing of them.

In cases of set-off, as well as in cases of recoupment and failure of consideration, the fact that the court of law has refused to admit the defense seems to constitute a reason, especially when other considerations assist, for the exercise of the extraordinary jurisdiction of the court of equity.

Taylor vs. Okey, 13 *Ves.* 180.

5. The Code of West Virginia, Ch. 133, Sec. 2, contains the following provisions: "A creditor, before obtaining a judgment "or decree for his claim, may institute any suit to avoid a gift, "conveyance, assignment, or transfer of, or charge upon, the estate "of his debtor, which he might institute after obtaining such judg- "ment or decree, and he may in such suit have all the relief in re- "spect to said estate, which he would be entitled to after obtain- "ing a judgment or decree for the claim which he may be entitled "to recover."

Under this statute the plaintiffs would have had the right, while the action was pending in the State Court, to institute a suit on the equity side of the State Court, to set aside the fraudulent conveyance which had been made by the defendant as set forth in the bill. Equity having thus obtained jurisdiction would necessarily have drawn to itself the entire controversy, the adverse claims being so related as to make it impossible that they should properly be heard apart. After the removal of the action at law to the Circuit Court of the United States, it became impossible for the plaintiffs to institute such a suit in equity in the State Court, because a complete assumption of jurisdiction over the controvery would have required the State Court to enjoin the action at law, which it could then no longer do.

Lead. Cas. Eq., 4th Ed., Vol. II, Part II, page 1389, *and the citations.*

The United States Court of Equity, therefore, was entitled to take jurisdiction of the controversy on this ground, in order that the plaintiffs might not lose the benefit of the rights secured to them by this statute.

This is not to base the equitable jurisdiction of the United States Court upon the statute of the State, which, it may be conceded, could not give jurisdiction. The jurisdiction comes because the United States Law Court has already obtained jurisdiction in a

different and independent way of a part of the controversy, and because this part must necessarily be taken into consideration in order that the whole controversy may properly be decided. The principle invoked resembles the principle already alluded to in discussing another branch of the case, under which the United States court of equity takes jurisdiction ot ancillary proceedings. It also resembles the principle governing the class of cases in which the United States Courts take jurisdiction, under the removal statutes, of proceedings, of which they have no original jurisdiction whatever. Thus, if the controversy had remained long enough in the State Court, and the present plaintiffs had filed a bill under the statute quoted to set aside the fraudulent conveyance, and that suit had been removed on application of either party to the Circuit Court of the United States, it would there have gone upon the equity side of the court, and jurisdiction would have been exercised, although the United States Courts, as courts of equity, might have no original jurisdiction of suits to set aside fraudulent conveyances brought by persons who had not acquired specific liens.

1 *Pom. Eq. Jur.*, § 293.

6. The determination of the present suit will involve an inquiry into the amount of the plaintiff's damages, but this presents no reason for doubting the jurisdiction of equity. An issue may be directed for the purpose or the amount of damages may be inquired into by a master.

Kelsey vs. Hobby, 16 *Peters* 269.

III. On the merits of the case the parties dffer as to the conclusions of fact to be drawn from the evidence as well as with reference to the principles of law which should be applied to them.

1. Our claim is that the contract between the parties was a contract for a sale by sample, from which there was implied a warranty that the coke delivered should be equal in quality to the sample; that in addition to the sample, there were promises and representations with regard to the quality of the coke as respected matters not discoverable from the sample, and that these constituted a warranty that the coke delivered should have the qualities covered by these representations and promises; and that, without regard to the sample, the representations or the promises, the contract was for the sale of an article not then in existence, to be used for a specific purpose known to both parties, and that, therefore,

an implied warranty arose that the coke delivered should be of good merchantable quality and reasonably fit for the purpose for which it was to be used.

a. The "trial lot" was intended by both parties to be used, and was, in fact, used and treated as a sample.

The answer, while denying this in one place, admits it in another, [*Record, page* 20]. The letter of Mr. Van Allen, dated September 9, 1872, proves the same thing.

The letter written September 20, 1872, [*Record, page* 151], is in the same line, as well as the letter of September 28, 1872, [*Record, page* 149.]

The only reason which either party could have had for testing or experimenting with this lot was that it might furnish the basis for future dealing between them. Of what avail would it have been to test this lot, unless it was a sample of what future shipments would be? The "trial lot" itself was consumed in the testing. It constituted a test, not of itself, for it was gone, but of the coke which was to follow.

It was claimed below that it was not open to the plaintiffs to show that the sale in this case was by sample, because the contract was in writing. To this we reply:

First. The contract was not in writing, but was an oral contract, entered into on the 4th day of October, 1872, and ratified by the letter of October 7, 1872, which is found on page 59 of the Record. The testimony of William L. Hearne shows that the contract was verbal. [*Record, page* 132.] The testimony of Van Alen proves the same thing. [*Record, page* 180, *Q.* 28.]

Second. If the letter of October 7, and the reply thereto, could be taken as a written memorandum of the contract, and as superseding the oral contract, yet this would not prevent the plaintiffs from showing that a sample had previously been furnished by the vendors, nor from showing that a warranty outside of the written contract had been made.

Foot vs. Bentley, 44 *N. Y.* 166;

Sweat vs. Shumway, 102 *Mass.* 368;

Stupes vs. Smith, 100 *Mass.* 63.

b. At the time when the contract was made, Mr. Van Alen made representations with reference to the coke, stating that it was strong, heavy coke, capable of bearing a heavy burden, and standing a strong blast, and particularly that it was low in sulphur.

[*See testimony of Mr. William L. Hearne, Record, page* 131 *and* 132.] Mr. Van Alen substantially admits this by the very qualified manner of his denial, [*Record, page* 180, *Q.* 31,] and on cross-examination he makes a more specific admission. [*Record, page* 208, *Q.* 289 *to* 291.]

The representations and promises, coupled with the sample, constituted a warranty that the coke to be delivered under the contract should have the apparent qualities of the sample, and should be low in sulphur, and this whether the sample was low in sulphur or not.

Heilbutt vs. Hickson, L. R. 7 *C. P.* 438.

c. There is no conflict in the evidence that the coke to be furnished was to be manufactured and furnished for a specific purpose which was known to both parties. There is some dispute whether the purpose was to use the coke alone or whether its was to use it only when mixed with Connellsville coke. It is not necessary to pursue this dispute, because the evidence plainly shows that the coke delivered under the contract was fit for neither the one purpose nor the other.

The purpose being known, a warranty arose that the coke should be of merchantable quality and reasonably fit to be used for the purpose for which it was intended.

It was claimed in the court below that such an implied warranty would not obtain where the contract was in writing. This contract was not in writing, as we have already shown, but even if it had been, the warranty would be none the less implied. The implication, whether the contract was oral or written, is from its nature something which is not expressed, but arises by force of law out of the circumstances.

Kellogg Bridge Co. vs. Hamilton, 110 *U. S.* 108;
Sheppard vs. Pybus, 3 *Man. & Gr.* 68;
Jones vs. Just, L. R. 3 *Q. B.* 197;
Hogins vs. Plympton, 11 *Pick.* 100;
Chapin vs. Dobson, 78 *N. Y.* 74;
Gerst vs. Jones, 32 *Gratt.* 518;
White vs. Miller, 71 *N. Y.* 118;
S. C. 78 *N. Y.* 393;
Wolcott vs. Mount, 9 *Vroom* 496;
Randal vs. Newson, 2 *Q. B. Div.* 102;
Drummond vs. Van Ingen, L. R. 12 *H. L. Cas.* 284.

It was insisted in the court below that where the article to be manufactured and delivered proved to be, on delivery, not suitable for its purpose, or not according to the sample or the representations which were made with regard to it, there was simply a breach of contract, which entitled the vendee to return the goods, but did not entitle him to accept the goods and recover damages as upon a warranty. Nearly all of the cases last cited bear upon this question, and show that whatever the rule may have been under some of the older cases, the later and more numerous authorities are the other way.

The effect, as well of the sample or "trial lot" as of the warranty implied in the agreement to manufacture coke for a known purpose, was sought to be avoided in the court below in another way. It was said that the coke was being manufactured and was to be manufactured from the refuse from the coal mines of the defendant, whose main business was the mining and selling of coal; that where one contracts to purchase the refuse matter produced in a business, he must take it as it comes; that there is no implied warranty that it will be suitable for the purpose for which he buys it. The case of *Holden vs. Clancy*, 58 *Barb.* 590, was strongly relied upon in support of this view.

Whatever may be the rule of law, the facts in this case do not bring it within the reason of *Holden vs. Clancy*. Mr. Van Alen, it is true, testifies that the coke was the "minor issue of the business." [*Record, p.* 197.] The *slack* from which the coke was made may have been a refuse of the business, as the business was conducted before the manufacture of coke began, but the *coke* itself was regularly manufactured, ovens were built for the purpose of manufacturing it, an expert coke man was procured from Connelsville, and a coarser screen was used in order that the yield of slack from the coal might be increased. [*Record, pages* 181, 183 *and* 191.]

A case like the one at bar is distinguished from a case like *Holden vs. Clancy*, in *Jones vs. Just, L. R.* 3 *Q. B.* 205.

2. It is ingeniously, though inaccurately, suggested in the answer that the trial lot itself was not of good quality, but was of a poor quality and so represented to the plaintiffs. As the bill alleged that it was of excellent quality, this suggestion imposed on us the double labor of first proving that the sample was good, and then that the subsequent deliveries were bad.

a. The trial lot was good coke.

So far as the qualities of the coke could be determined by inspection the trial lot did not exhibit any defects, although it was carefully inspected. [*Record, pages* 51 *and* 41.] Even Mr. Van Alen, forgetting that the answer had stated that the sample or trial lot was not good, extols both it and the subsequent deliveries as being "silvery white, and as handsome as any coke you could find anywhere." [*Record, p.* 184.]

More important than looking well, the trial lot worked well in the furnace and made good iron. [*Record, pages* 37, 39, 131, 138, 40 *and* 46.]

There were good reasons why the trial lot should have been of excellent quality; extraordinary care was taken in its manufacture; Mr. Van Alen gave it his personal attention, and a considerable quantity of "merchantable" or "run of the mine" coal was used. [*Record, pages* 166, 201 *and* 202.]

In response to this evidence, there is not a syllable of testimony on behalf of the defendant to the effect that the trial lot was not thoroughly good coke.

Nor did the plaintiffs represent that the trial lot was not good coke. On the contrary their "talk was favorable to the coke." [*Record, p.* 180, *Q.* 30.]

3. The coke delivered under the contract, while it did not greatly differ in appearance from the trial lot, was in fact, very inferior coke, and especially contained an undue quantity, of sulphur, which caused the plaintiffs' furnace to work badly, and to produce an inferior and less valuable iron.

A large portion of the evidence which was taken in the cause bears directly upon the inferiority of the coke delivered under the contract, and it is probably unnecessary to point out the specific portions of this testimony. William L. Hearne, Frank J. Hearne and McCune all testified with regard to this subject. On the other hand the defendant adduced no answering testimony, confining itself to apologizing for the use of an old slack bank in the manufacture of the coke, and to general statements with regard to the care used in the manufacture. It is useless to follow particularly the controversy with regard to this old slack bank, and it would be also unprofitable to make particular citations of the portions of the evidence bearing on the question whether the plaintiffs complained of the quality of the coke, or the question, whether as intimated in the answer, they were induced to refuse to accept the Fairmont

coke rather by the fact that the price of the Connelsville coke had declined, than by the fact that the Fairmont coke had deteriorated. On all these questions, the imputations contained in the answer are plainly refuted by the proofs.

4. The coke delivered under the contract was inferior to the sample, was not according to the representations and promises of the defendant, and was not suitable for the purposes for which it was purchased. The plaintiff suffered damage in the use of this coke, the quality of the iron produced being injuriously affected by the sulphur in the coke, and being much less valuable than it would have been had the coke been free from sulphur, or, as Mr. Van Alen expressed it, "low in sulphur."

The plaintiffs received and paid for more than one-third of the coke which the contract provided for. The deliveries were extended over a much longer period than that contemplated by the contract, because the coke delivered was so poor that the proportion which could be used was much less than had been expected. After earnest and continued efforts to use the coke successfully, the plaintiffs finally declined to receive any more coke under the contract.

The defendant claimed in the court below with reference to the coke which was delivered and paid for, that the acceptance and use of it by the plaintiffs was the end of the matter. Its claim was that if the coke was not according to the contract, that fact constituted a breach of the contract, which entitled the plaintiffs only to return or offer to return the coke, but when the coke was received and used this right was waived, and the plaintiffs had no further rights in the matter.

The plaintiffs on the other hand claimed that the contract contained a warranty, whether the warranty grew out of the sample, the representations or the implication from the purpose for which the coke was purchased; and that the fact that the coke was of poor quality, and especially that it contained an excess of sulphur, constituted a breach of this warranty which gave the plaintiffs the right to recover the damages which they had sustained in the use of the coke, notwithstanding the fact that they had not rejected or returned it.

Kellogg Bridge Co. vs. Hamilton, 110 *U. S.* 108.

This contract was a West Virginia contract, and the rights of the parties under it are to be determined by the laws of that state.

For this reason the case of *Gerst vs. Jones*, 32 *Gratt.* 518, which is very similar to the case at bar, is entitled to much weight. The English cases already referred to, as well as those cited from New York and New Jersey, also fully sustain the position of the plaintiffs on this point.

5. The plaintiffs were also damaged by the failure of the defendant to furnish the coke according to contract, and by the necessity they were under of substituting another coke at a greater price. There seems to be no difference between the parties with regard to the rules of law applicable to this claim, though they had differed widely, in their pleadings at least, with regard to the facts. The plaintiffs claim that they were at all times ready to receive coke such as the contract called for, but that the defendant wholly failed to furnish coke of the required quality. The defendant claims that the coke which it agreed to furnish was to be of inferior quality, and that the coke delivered, and therefore the coke which it was ready to deliver and would have delivered was of excellent quality. A discussion of the merits of these claims would lead into a particular examination of the voluminous depositions in the case, which we do not understand to be proper in an argument such as the present.

A succinct statement of the method followed in ascertaining the damages under each of the claims made by the plaintiffs, will be found on pages 53 and 54 of the Record.

IV. The cross-bill filed by the West Fairmont Gas Coal Company was properly dismissed by the court. It sets up the making of the contract, the failure of the plaintiffs to receive the coke as contracted for, and certain damage to the defendant thereby.

1. The whole claim of the defendant, as well in its action at law, as in its cross bill, is based upon the assumption that it complied with the contract on its part by furnishing coke which fulfilled the terms of the contract. It has been already shown in this argument, and it can be very much more elaborately proved from the evidence in the cause, that this assumption can not be maintained. The plaintiffs, therefore, had a right to refuse to receive this coke as they did, and the defendant, no matter what damages it may have sustained by reason of the refusal, is not entitled to recover them from the plaintiffs.

2. One of the elements of damage claimed by the defendant is

the ordinary vendor's claim for the refusal of the purchaser to accept the goods purchased. It does not seem to be pretended in this case that the defendant has placed itself in a position to entitle it to sue for the contract price. If the sale was made by sample, an opportunity must have been given the purchaser to inspect the coke delivered. If it was not a sale by sample, but a contract for the sale of an article to be manufactured, the purchaser must still have an opportunity to inspect and reject the coke. In either case, in order that the vendor may sue for the contract price, the property in the coke must have become vested in the purchaser. In the present case the property in the undelivered coke never vested in the plaintiffs, The defendant was not selling all of its coke to the plaintiffs, but was selling some to other persons, so that the property in the coke which was at the defendant's ovens could not vest in the plaintiffs until the delivery upon the cars. Besides that, only a small portion of the coke which was to have been delivered was ever manufactured by the defendant. [*Record, p.* 311.]

If the defendant is entitled to any damages, the measure of these damages would be the difference between the contract price of the coke and the price for which the same coke could have been sold in open market, supposing the latter price to have been less than the former. Between October 1, 1872, and July 1, 1873, the defendants sold 269 car loads of coke, [*Record, p.* 211,] of which only 156 car loads were shipped to the plaintiffs, [*Record, p.* 105,] so that during that period, 113 car loads were sold to other persons. According to Mr. Van Alen's testimony, the coke sold to other persons was sold at prices which "varied from 5½ to 7½ cents per "bushel. I may have even got higher than 7½ cents. I have "no recollection of selling any at 5½ cents per bushel." It is not clear how the price could *vary* from 5½ to 7½ cents, when no coke was sold as low as 5½ cents; but if the average of the prices named by Mr. Van Alen be taken, it will be found that the coke which he sold to other persons during the period covered by the contract, was sold at 6½ cents per bushel, which was just one-half cent per bushel more than the contract price.

The defendant endeavored to bring the case under an exception to the rule according to which its damages would be measured by the difference between the contract price and the market price,—the result of the application of which rule would logically be that the defendant would pay over to the plaintiffs one-half cent for every

bushel of coke which was not delivered. It was suggested that the case belonged rather to the class of cases of which *Chicago vs. Green*, 9 *Wall.* 726, is an example. Those, however, are cases where in the first place the article contracted for had been, in fact, manufactured, and second, there was no market whatever for the commodity which formed the subject of the contract. The article in question here is a staple for which there is always a market somewhere, and the most that is pretended by the defendant's witnesses is that at times it was difficult to sell at a priee which suited them.

3. Another claim made by the defendant is that it is entitled to recover as part of its damages, the money which it expended in erecting the coke ovens for the manufacture of coke. The cross-bill says, [*Record, p.* 32,] that the defendant having entered into the contract, and in reliance upon it, proceeded to erect and did erect, at its mines near Fairmont, a large number of coke ovens, at an expenditure of $5,000, and that these ovens "became a loss" to the defendant by reason of the breach of the contract by the plaintiffs.

The only ovens which the defendant built at any time were a lot of fifty ovens, of which one was never completed. So far from its being true that these ovens were begun in reliance upon the contract, the fact is that the whole number had been *begun*, according to the testimony of Mr. Van Alen himself, prior to the making of the contract. [*Record, p.* 212.] While another of the defendant's witnesses states that the whole number were *finished* in November, 1872, and that from thirty to forty were in operation at the time when the contract was made. [*Record, p.* 164.]

It is apparent, therefore, that this element of damage, while it could not under any rule of law be properly considered in this case, is not sustained by the defendants, own proofs.

DANIEL LAMB,
WM. H. HEARNE,
HENRY M. RUSSELL,
Solicitors for Plaintiffs.

WHEELING, Oct. 19, 1887.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1887.

NO. 60.

DEWEY, VANCE & CO., *Appellants*,

vs.

THE WEST FAIRMONT GAS COAL CO. AND OTHERS, *Appellees*.

NO. 179.

THE WEST FAIRMONT GAS COAL CO., *Appellant*,

vs.

DEWEY, VANCE & CO., *Appellees*.

BRIEF FOR APPELLEES.

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THE WEST FAIRMONT GAS COAL CO., *Appellant*,

vs.

DEWEY, VANCE & CO., *Appellees*.

STATEMENT OF FACTS.

1. In the year 1872 the appellee (the real plaintiff in this litigation) was engaged in mining and shipping gas coal at Fairmont, West Virginia.

2 As yet no experiment or test had been made of the fitness of Fairmont coal for conversion into coke to be used in the manufacture of iron: which is the principal use to which coke is applied.

3. In the process of mining coal large quantities of slack, or fine coal, are produced. This slack is not of any value as coal, but is in the form and condition most desirable for manufacture into coke.

4. In many bituminous coals there are, chemically combined with the coal, or mingled mechanically with it, sulphur and phosphorus, in such proportions that these properties can not be sufficiently expelled by the process of coking the coal: and therefore coke produced from such coals is either inferior, or unfit, for use in the manfacture of iron.

5. Sulphur chemically combined can not be detected by inspection, but is harmless, because it passes off, being volatized, in the process of coking and in the iron furnace. Sulphur mechanically mingled with the coal affects the iron in-

juriously; but its presence in the coke can be detected by inspection (record page, 50). Actual experiment, however, ascertains more satisfactorily, the quantity of sulphur and its effects upon the product, the iron, in the manufacture of which it has been used.

6. These conditions existing, the appellee, the West Fairmont Gas Coal Company, furnished to the appellants, who were manufacturers of iron at Wheeling, at their request, thirty-four car-loads of coke in 1872, manufactured by said Gas Coal Company from its coal at Fairmont, or from the slack or fine coal produced in the process of mining.

7. These thirty-four car-loads were taken and used by appellants mainly with the purpose of observing, ascertaining and testing the quality and fitness of the coke for use in the manfacture of iron.

8. Having made this test, appellants reported to appellee that the coke was of inferior quality, but that they could use it in their manufacture in combination with Connellsville coke —the latter being coke of the best quality.

9. The appellants then, about October 4, 1872, contracted with appellees for an average of three car-loads of coke per day from them until July 1, 1873, to be delivered to appellants' furnace as ordered; to be paid for at the rate of six cents per bushel of 41 pounds. Under this contract it was appellee's duty to deliver 681 car-loads, as ordered; equivalent to 424,944 bushels; and it was appellants' duty to receive the same and to pay therefor $25,496.64.

10. Appellants continued to demand, and to receive and pay for coke, under this contract, at intervals covering a period of fourteen months—five months longer than the whole period contemplated for the delivery of all the coke embraced by the contract. This disregard of the time limited by the contract, and this indefinite extension of the time for the delivery, proceeded from the failure of the appellants to order or require deliveries as rapidly as the terms of the contract provided: but the extension of the time was tacitly and mutually acquiesced in by the parties. In all other respects they continued to observe the terms of the contract.

11. Appellee continued to deliver coke as fast as appellants could or would receive it, and was never in default in making deliveries.

12. Appellee delivered 246 car loads; all of which appellants received, used and paid for according to the terms of the contract, without objection in any instance: the payments being in every instance subsequent to the receipt and use of the coke to which they respectively applied. The mode and time of payment conformed to the requirements of the contract.

13. On the 13th day of December, 1872, sixty-seven days after the making of the contract, and when as yet less than 100 car loads of coke had been delivered, appellants complained of the quality of some of the coke and informed appellee that improper material had been used in its manufacture. Appellee at once discontinued the use of that material, and appellants continued to receive, use and pay for the subsequent deliveries of coke according to the contract, from and after the said 13th day of December, 1872, until about the 30th of November, 1873.

14. During this period of nearly one year no complaint was uttered by appellants in regard to the quality of any coke delivered within that period, nor upon any other account. The reduced quantity ordered by appellants was tacitly acquiesced in by appellee, and the execution of the contract proceeded, according to its terms thus modified by the tacit and mutual acquiescense of the parties.

15. As late as December 4, 1873, appellants, by plain implication, claimed the right to have the said contract fully executed by appellee according to its terms.

(See Record, page 77.)

16. Appellants without refusing to receive coke from appellee in further execution of the contract, simply and silently omitted to order any more coke from appellee after the 30th of November, 1873, and thus omitted, still without refusing, though importuned by appellee to send further orders for coke, until January, 1877, when appellee brought an action of assumpsit against appellants in the Circuit Court of Ohio county, for the refusal of appellants to order, receive and pay for the full amount of coke named in the contract.

That action of assumpsit was afterwards, on the petttion of the plaintiff therein, removed to the Circuit Court of the United States for the District of West Virginia.

17. The appellants then filed this bill alleging damages by reason of the alleged failure of appellee to deliver the full quantity of coke contracted for, and damages also because of injury done to their manufactured product by reason of the impurity and deliterious character of the coke actually delivered, used and paid for. Upon this bill the appellants obtained an injunction to the further prosecution of the said action of assumpsit.

18. To this bill a plea in abatement was filed by appellee, which was overruled, and a demurrer was then filed which was also overruled. Both plea and demurrer went to the jurisdiction of the court of chancery over the subject matter of the bill. Appellee then answered and filed a cross-bill, to which an answer was filed, and issues being thus ma e up, proofs were taken, and on the 11th day of April, 1881, the cause was heard, the injunction dissolved, and the bill dismissed. The cross-bill was also dismissed but with costs to the complainant therein.

APPELLEE'S ASSIGNMENT OF ERROR.

From that decree this appeal comes. The appellee, being complainant in the cross-bill, appeals from so much of the same decree as dismisses the cross-bill.

This cross-appeal is taken in order to insist in this Court that if the subject of the original bill be within the jurisdiction of equity, then it was error to dismiss the cross-bill and the decree of the Circuit Court ought to be so far reversed; and the cause ought to be proceeded with upon the cross-bill; unless, indeed, the cross-bill is to be regarded as so far contingent upon the original that it falls with it.

And second, That in case this Court should be of opinion to reverse the decree of the Circuit Court in so far as that decree dismisses the original bill, then the reversal should extend to so much of the decree as dismisses the cross-bill.

Assuming that the jurisdiction is well taken the appellee contends:

First. That the Circuit Court did not err in dismissing the original bill.

The propositions of fact herein above stated are not controverted. The whole gravamen of the bill is that the coke delivered by the appellee under the contract, was not equal in quality to what the appellants describe as "the trial lot" delivered antecedently to the making of the contract. For the appellee it is contended that, even if this were proven, the appellants would not be entitled to any relief upon all the proof taken together.

APPELLANT'S ACQUIESCENCE.

The appellants began in October, 1872, to receive coke under the contract. They continued to order, to receive, to use and to pay for the coke as delivered under the contract, at intervals covering a period of about fourteen months, and their acquiescence in the performance of the contract, *pro tanto*, on the part of the appellee, continued perfect and unqualified until after the action at law was begun against them in January, 1877—more than four years.

The whole course of conduct of the appellants by which they constantly proclaimed to the appellee the sufficiency and acceptability of the coke delivered, and their acceptance of appellee's performance of the contract, so far as performance had been permitted to proceed, if it do not rise to the technical conclusiveness of an estoppel upon the appellants to deny now that appellee's performance, *pro tanto*, was satisfactory and acceptable, does at least, when weighed against their later pretensions and statements, condemn the latter as incredible.

Let it be remembered that the sole complaint made by the appellants was of the quality of some coke delivered prior to December 13, 1872. (Printed record, 134). After that date they received, used and paid for 150 additional car loads—almost two-thirds of the whole quantity of coke received by them under the contract—and this without complaint or objection. Afterwards, on the 4th day of December, 1873, they explain to the appellee that they had "stopped shipments from Fairmont" because they were "accumu-

lating stock." (Printed record, page 77). This letter last referred to, was written in reply to a letter of Mr. Van Alen, President of Corporation, appellee, on the 28th of November, 1873, (record, page 76,) and it shows that appellants still recognized the contract and held themselves in a position to insist upon its full performance.

Thus by their conduct, persisted in ever since December 13, 1872, appellants had given appellee the right to believe that the coke delivered subsequently to the date last mentioned, was satisfactory. Indeed the letter of appellants of December 13, 1872, by necessary implication, approves all the coke delivered under the contract, except that therein referred to as having been "made from dirty slack;" which is obviously the same referred to in appellants' letter of December 13, 1872. (Record, pp. 129, 134.)

The receipt and use of the coke, and the long delay of the appellants in objecting to its quality, amount to a waiver of objections.

2 Benj. on Sales, 4th Am. Ed., page 916, notes and cases cited; *Phillips & Colby Constr. Co. v. Seymour*, 91 U. S. 646, 652; *Davis v. Fish*, 1 G. Greene, 406; S. C. 48 Am. Dec. 387; *Hedden v. Roberts*, 134 Mass. 38.

If the pretensions of the appellants were true they would have had a right to declare the contract abandoned. (91 U. S. 650.)

THE SALE WAS NOT BY SAMPLE.

Appellee denies that the sale of the coke was a "sale by sample" in the legal and proper sense of those terms. (*Barnard v. Kellogg*, 10 Wall, 383.) It is conceded that appellants were entitled under the contract, to coke manufactured in the same manner and from material of the same kind taken from the same mine as the 34 car loads delivered antecedently to the contract. But the proofs show that the quality of coke, or its fitness for the manufacture of iron, is not within the control of the manufacturer. The manufacturer can not impart to it any other qualities than those which are the necessary qualities belonging to coke properly manufactured from the kind of coal from which the coke is produced. Appellants were entitled to coke prop-

erly manufactured out of coal mined and taken from appellee's mine at Fairmont. The proofs show that all care and pains were taken, and the best skill exercised in the manufacture of the coke; that the best ovens were constructed and used; that the process of manufacture was the best known, and that the material was obtained from the same mine, and precisely similar to that used in the manufacture of "the trial lot," unless the use, at one time, of "some slack from an old slack pile" shall be allowed to constitute an exception—the same referred to in appellants' letter of December 13, 1872, and again in the postscript to their letter of December 31, 1873. (Record, pp. 129, 134.)

And upon these questions there is no opposing testimony. There is no evidence tending to show that the process of manufacture was not the best; nor that it was inferior to or different from the process used in the manufacture of "the trial lot;" nor that the material was inferior or different, save only as to the old slack used for a very limited time and instantly discontinued upon notice that it was believed to be detrimental.

(See testimony of C. M. Davison, O. Jackson and Van Alen, record, pp. 153 to 219.)

The lot called by appellants "the trial lot" was received and used by them as the means of ascertaining for themselves the quality of coke made from Fairmont coal. The appellee made no representation as to the quality of the coke nor any warranty that the quality should be uniform, or that it should correspond to any particular standard or measure of excellence.

NO WARRANTY OF FITNESS.

Nor is there here any implied warranty that the coke should be reasonably fit for the purpose for which it was to be used. The appellee can not be taken even to have expressed, or to have given by implication, an opinion as to the fitness of the coke for the manufacture of iron. The appellants themselves passed upon the question of its fitness, having applied their own experiments and tests. It is not a case in which the vendee relied upon the judgment, or upon any representation, of the vendor.

Where one, relying upon his own judgment, buys a specific article from a manufacturer, believing it will answer a particular purpose, he is bound to pay for it, and there is no warranty implied against the vendor.

Charter v. Hopkins, 4 M & W.,399.

Burnby v. *Bollet*, 6 Id., 644.

Ollivant v. Bayley, 5 Q. B.,288.

Nor is this a case where an article is ordered from a manufacturer to be used for a specific purpose, and where the manufacturer is left free to choose the best material. Here the vendee ordered coke to be made, as he knew, from Fairmont coal, and any defect therein is due to the fact that Fairmont coal contains sulphur. The appellants are in the position of having ordered an article, believing upon evidence obtained by and for themselves through their own examination of the article and their own experiments and tests of its fitness, that it would serve their purpose. If they were mistaken as to its fitness, they must pay for it, nevertheless. (*Chanter v. Hopkins*, 4 M. & W., 404; *Mason v. Chappell*, 15 Gratt., 572; *Port Carbon Ins. Co. v. Grove*, 68 Pa. St., 149; *Brown v. Edgington*, 2 M. & G.; 40 Eng. Ch'y Rep., 371; *Hoe v. Sanborn*, 21 N. Y., 553; *Cunningham v. Hall*, 4 Allen, 268, 274; *Mrchdale v. More*, 19 Ills., 565; *Whitaker v. Eastrick*, 75 Pa. St., 229; *Kirk v. Nice*, 2 Watts, 367; *Sands v. Taylor*, 5 Johns., 395.

PAROL EVIDENCE NOT ADMISSIBLE.

In this case the terms of the contract are stated in writing by the appellants (record, page 59) and repeated by the appellee (record, page 136). This writing must be taken to contain all the terms of the verbal agreement of October 4th, 1872; nor is this writing a hurried memorandum, but a complete repository of the intention of the parties, doubtless made to prevent such a controversy as this. Parol proof that the coke was warranted or sold by sample is inadmissible. In the court below *Chapin v. Dobson*, 78 N. Y., 74, was cited. That case is examined and criticised and shown not to be law, in chapter 12 of Jones on Commercial Contracts. (See cases cited.)

Where there is a written contract of sale without mention of sample, parol evidence is not admissible that the sale was

by sample. (*Rainer v. Groves*, 16 C. B. [80 E. C. L. R.] 667; Addison on Contracts, 622.

The plain and necessary conclusion is that the appellants, having informed themselves by their own experiment, of the result of which the appellee could know nothing, contracted in writing for three car-loads of coke per day, on the average, from thence (Oct. 4, 1872,) until July, 1873, without exacting a warranty that the bulk should be of the same quality as the trial lot." In the nature of the case the vendor could not control the quality of its manufactured product, nor secure uniformity of quality, any farther than such control could be exercised and such uniformity obtained by the use of similar material and the same process of manufacture. Such a warranty can not now be superadded to the contract. No such thing entered into the bargain. The "trial lot" was wholly antecedent to the contract and separate from it.

Kain v. Old, 2 B. & C., 627.

Osborn v. Ganz, 60 N. Y., 540.

But if any warranty could be implied it would be simply that the coke would answer as well in combination with Connellsville coke as other Fairmont coal would.

Robinson Works v. Chandler, 56 Ind., 575.

In this case the "trial lot" was furnished not as a sample taken from a bulk then already in existence, but as in the case of *Gardiner v. Gray*, it was furnished "to enable the purchaser to form a reasonable judgment of the commodity.

Gardiner v. Gray, 4 Camp., 144.

See also *Wood v. Ash*, 1 Strobh., 457; *Fisher v. Samuda*, 1 Campb., 190.

It is to be remembered that the coke was sold not to be used alone, but with a large proportion of Connellsville coke; which proportion the appellants ascertained and determined for themselves. At least, if the pretensions of the appellants are to be regarded, this was a term of the contract.

DUTY OF VENDEE TO REJECT.

It is clear from the pleadings and testimony that the coke actually received and used by the appellants, was received, and was used, in many small quantities, and with intervals

between. The appellants had, therefore, as many opportunities to note and to decide upon the quality of the coke, and to reject subsequent deliveries and to rescind the contract: and it was their duty to have rescinded the contract if their present pretensions be true, and not by their acquiescense and silence to ensnare their vendor into a ruinous liability in damages.

Couston v. Chapman, L. R. 2, Sc. App. 250.
Hargons v. Stone, 5 N. Y., 73, 86.
McCormick v. Sarson, 45 N. Y.,,265.
Dounce v. Dow, 64 N. Y.,411.
Reed v. Randall, 29 Id., 358.
Holden v. Clang, 58 Barb., 590.
Warren Glass Works Co. v. Keystone Coal Co., 65 Md., 547; S. C. 3 Central Reporter, 851.

DAMAGES CLAIMED BY APPELLANTS.

The appellee contends that the damages claimed by appellants are fanciful; but if not, they are not shown to have proceeded from the use of Fairmont coke in due proportion with Connellsville coke. The testimony of the witness Hearne, is a mass of argument, inference and assumption. He is squarely contradicted by the furnace records. (Exhibit "G," record, p. 128.) The iron produced during at least one period in which Fairmont coke was used, was of a value greater than the average market price of iron. This witness would make the impression that the product of the furnace was diminished in quantity and deteriorated in quality during the months of October, November and December, 1872. (Record, pp. 53, 54.) He is afterwards referred to this same subject and is constrained to admit that during the time of the manufacture of the deteriorated iron referred to by him, (record pp. 53, 54,) he does not certainly know whether any Fairmont coke was used or not. (Record, pp. 116, 117, 118.)

The pretence made in the bill and resolutely aided by this witness, F. J. Hearne, viz., that appellants discontinued the use of Fairmont coke and refused to accept any more of it-because of its inferiority to the "trial lot" is shown to be a false pretence by the fact that they did never refuse to ac, cept more of it, but simply and silently ceased to send orders

for it when the price of Connellsville coke had declined to three cents per bushel, (record, page 65); having diminished their orders for Fairmont coke, *pari passu*, with the decline in the price of Connellsville coke.

This pretence is also shown to be false by the letters of the appellants; in none of which do they assign any such reason for stopping their orders for Fairmont coke. (Record, pp. 65, 77, 117, 118, 129.)

Appellants would justly scorn any imputation of having merely dallied with appellee in order to keep a nominal competitor in the coke market, and thereby keep down the price of Connellsville coke.

But the Circuit Court having found as a fact, that the appellants had not suffered any damages, it needs not to discuss that matter more directly.

THE CROSS-BILL.

The pleadings and proofs show the appellee entitled to relief against the appellants.

The cross-bill is a sufficient basis for a decree. It should not have been dismissed. The Circuit Court dismissed the original bill because that Court was of opinion that appellants had suffered no damages, (record, p. 221). No reason was assigned for the dismissal of the cross-bill; and it is fairly presumed that its dismissal was because the Court was of opinion that the cross-bill could not be retained, the orginal being dismissed.

This we respectfully insist is erroneous. *More v. Huntington*, 17 Wall., 417, 421. The cross-bill is not merely defensive: it sets up additional facts and prays affirmative relief. In such case the dismissal of the original does not carry with it the cross-bill. The latter remains for disposition as if it had been filed as an original bill.

2 Daniell's Chy. Pr. (5th Ed.) 1553, note 3, and cases there cited.

Raglang v. Brodnax, 29 Gratt., 401, 419.

APPELLEE'S DAMAGES.

The appellee asks a decree for the damages suffered by reason of the refusal of the appellants to receive the remainder of the coke contracted for and to pay for it. There

can be no doubt that, under the contract, the appellants could have compelled the appellee to furnish the 436 car loads of coke remaining undelivered. If appellants had that right they must have been under a corresponding obligation to receive the coke. There must be mutuality.

And it is not true, as has been contended by appellants, that the appellee's damages are to be measured by a comparison of the market price, at the time of refusal, with the contract price. But even if this were so, it is in evidence from a letter of the appellants themselves (Exhibit "W", record, page 65) that shortly before January 17, 1874, the market price of Connellsville coke had declined very considerably. As is shown by a comparison of the contract price of Fairmonr with that of Connellsville coke, the former was considerably inferior to the latter in value, and that inferiority must be presumed to have persisted during the fluctuations in the price of Connellsville coke. From the letter which has been referred to, it will be seen, that both the items which enter into the price of Connellsville coke in the city of Wheeling had largely declined. The price at the mines had declined two cents per bushel; the freight had been reduced by railroad competition, as we are assured in the same letter. Connellsville coke still had a market price in Wheeling it would seem. If a market price there for Fairmont coke could be ascertained by comparison with Connellsville coke, it must have likewise declined at least two cents per bushel. There was that much of a decline, if we leave out of consideration the reduction in freights. There remained to be delivered under the contract 436 cars of—say 729 bushels each—or 270,320 bushels, the decline on which, at two cents a bushel, would be $5,406.40-100, to which must be added such further amount as the market price in Wheeling was reduced by the reduction of railroad freights on Connellsville coke. This, however, is not a proper measure of damages in this case. The just and proper measure of damages is such an amount as will put the party injured in the same situation as if the other party had complied with his contract. When the complainants broke their contract in November, 1873, there was no market price for Fairmont coke. The area in which any con-

siderable quantity could be sold was limited at all times by the local rate of freight mentioned in Dewey, Vance & Co.'s letter of January 17, 1874. (Record, p. 65.) There was at that time no market for defendants' coke (Van Alen, p. 185). Complainants themselves had at that time become aware of the partial destruction of the market for defendants' coke (F. J. Hearne, pp. 65, 125), and sought to take advantage of it to get an additional contract for Fairmont coke at lower rates (p. 65). In such a case as this, other methods of ascertaining defendants' damages than a comparison with a market price, may and must be resorted to, and we are entitled to show by such evidence as that given by Mr. Van Alen, the amount of profit there was for us in the contract which the complainants broke.

Estimating the cost of the coke manufactured at $2\frac{3}{4}$ cents per bushel, the highest figure mentioned, and we have our damages assessed at $8,792.20. There was also a considerable quantity of coke manufactured for appellants which was lost by their not taking it, but of which no exact account was kept. (Van Alen, p. 206.)

The testimony of Mr. Van Alen furnishes the facts from which we can ascertain what amount it would take to put the defendants in the same situation as if the complainants had performed their contract. He says that the damages suffered by defendants because of complainants' failure to receive the 436 car loads was between $9,000 and $10,000 (p. 188), an estimate which was based on the cost of the coke which was delivered. That certainly was a fair basis, for in the declining condition of the iron and coke market, it cannot be supposed that the cost of manufacturing coke increased. Mr. Van Alen was right in excluding from the estimate of the cost of the coke fixed expenses, such as salaries (p. 197). They were not expenses incurred in the manufacture of coke. They existed before that manufacture began. The slack out of which the coke was manufactured was refuse. It had no value because of the labor which had been expended on the coal. Its value consisted in the fact that it was susceptible of further expenditures upon it which would make it saleable. The salary of the Connellsville coke boss was charged to the coke. No repairs were included in the

costs, for none were necessary. Mr. Van Alen was right in not including interest, for interest is not expense but is itself profit.

The whole conception of the appellants claim is admirable for its audacity. In the whole range of cases arising upon contracts, when before was it pretended that one of the parties to a contract requiring a long time for its execution, can maintain himself in such an attitude and relation to the contract that he may either continuously insist upon its complete execution, or at his own option, any moment, and without notice, discharge himself from all obligation to execute it on his part, thus preserving a position in which he may play fast and loose with his obligation according as his interest or his caprice may suggest?

The position of the appellants involves the proposition that although they were entitled to demand regular deliveries of such coke as they had been using, yet they were not bound to receive it when delivered, or that they might receive it without objection, consume it, knowing its quality, and then sue for damages because of its alleged inferiority.

Appellants never relieved the appellee from the duty of holding themselves in readiness to supply coke whenever it should be again demanded. The last letter addressed by D., V. & Co. to the Coal Co. plainly contemplates further orders for coke, and the latter company was bound to hold itself ready to resume deliveries, for it had silently, if not expressly, acquiesced in an extension of the time for executing the contract by submitting to deliver a smaller average than three cars per day. Though not waiving any right by this acquiescense, it had taken no advantage of the default of D., V. & Co., and was precluded from refusing to resume deliveries of coke whenever it should be required to resume, even if it had preferred to refuse. But all these considerations have already been presented.

WM. P. HUBBARD,
JAMES MORROW, JR.